

# COMMON MARKET LAW REVIEW

## CONTENTS Vol. 51 No. 1 February 2014

Editorial comment: *Union membership in times of crisis* 1–12

### Articles

- P. Gragl, A giant leap for European Human Rights? The Final Agreement on the European Union's accession to the European Convention on Human Rights 13–58
- A. von Bogdandy and M. Ioannidis, Systemic deficiency in the rule of law: What it is, what has been done, what can be done 59–96
- A. Alemanno and O. Stefan, Openness at the Court of Justice of the European Union: Toppling a taboo 97–140
- P. Ibanez Colomo, Exclusionary discrimination under Article 102 TFEU 141–164
- G. Wagner, Private law enforcement through ADR: Wonder drug or snake oil? 165–194
- F.-X. Millet, How much lenience for how much cooperation? On the first preliminary reference of the French Constitutional Council to the Court of Justice 195–218
- E. Muir, The fundamental rights implications of EU legislation: Some constitutional challenges 219–246

### Case law

#### A. Court of Justice

- Enhanced cooperation as a tool to ... enhance integration? *Spain and Italy v. Council*, E. Pistoia 247–260
- Managing decentralized antitrust enforcement: *Toshiba*, G. Monti 261–280
- Can competition law repair patent law and administrative procedures? *AstraZeneca*, R. Podszun 281–294

#### B. EFTA Court

- EU law impact on deposit protection in the financial crisis: *Icesave*, M. Hanten and M. Plaschke 295–310

**Book reviews** 311–344

**Survey of Literature** 345–366

**Publications received** 367–374

**Aims**

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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## A GIANT LEAP FOR EUROPEAN HUMAN RIGHTS? THE FINAL AGREEMENT ON THE EUROPEAN UNION'S ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

PAUL GRAGL\*

### Abstract

*After the EU's accession to the ECHR has been discussed for more than thirty years, an Accession Agreement has been finalized in 2013. By subjecting EU law to the supervision of the ECtHR and by enabling individuals to submit complaints against the EU institutions to Strasbourg, one of the last gaps in European human rights protection will be overcome. But accession may not take place as swiftly as some may hope for, as many legal problems remain unsolved. This article examines the most urgent legal issues in the context of accession, such as its scope and legal effects; its procedural aspects (the co-respondent mechanism, inter-Party cases, and the prior involvement procedure) and their relation to the Union's legal autonomy; and the institutional interlacing of the EU and the Council of Europe and the former's future involvement in the Parliamentary Assembly and in the Committee of Ministers.*

### 1. Introduction

With regard to the European Union's future accession to the European Convention on Human Rights, one could paraphrase the words of the first man on the moon, and say that what appears like a small step from the outside, may be a giant leap for Europe. In a historically unprecedented move, a non-State entity (or, to use an alternative notion to capture the EU's uncertain legal status: an international organization *sui generis*<sup>1</sup>) will accede to a human rights treaty and subject itself to this treaty's judicial supervision regime. One

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1. Von Bogdandy, "Grundprinzipien" in Von Bogdandy and Bast (eds.), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge*, 2nd ed. (Springer, 2009), pp. 15 and 32.

of the most intriguing aspects of accession is, however, that the EU Member States are already Contracting Parties to the Convention.<sup>2</sup> In this vein, accession intends to end this anomaly and enhance the EU's credibility as a human rights actor within the "greater Europe" of the Council of Europe.<sup>3</sup> After more than thirty years of discussion,<sup>4</sup> EU-internal setbacks like Opinion 2/94 finding a lack of EU competence to accede to the Convention,<sup>5</sup> and the eventual entry into force of both Protocol No. 14<sup>6</sup> and the Treaty of Lisbon,<sup>7</sup> the last years have seen the successful completion of negotiations on the final Agreement on EU Accession to the Convention (hereinafter: AA)<sup>8</sup> and its Explanatory Report<sup>9</sup> in April 2013. Heralded as the "End of an Epic",<sup>10</sup> this new legal *status quo* will most certainly "deprive academics and lawyers of one of their favourite topics".<sup>11</sup> The Accession Agreement aims at lifting the "organizational veil" of the EU behind which the Member States have successfully hidden,<sup>12</sup> as the *Bosphorus* judgment of the European Court of Human Rights (ECtHR) descriptively demonstrated. Until the EU has acceded to the Convention, the EU Member States (when implementing Union law) will not be held responsible for alleged violations of the Convention as long as the Union protects fundamental rights in a manner equivalent to that provided by the Convention.<sup>13</sup>

The Accession Agreement constitutes the last step of a growing interlocked system of fundamental rights, and intends to enhance the effective

2. Obwexer, "Der Beitritt der EU zur EMRK: Rechtsgrundlagen, Rechtsfragen und Rechtsfolgen", 47 EuR (2012), 115–148, 115.

3. Ladenburger, "The protection of fundamental rights post-Lisbon: The interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions", Institutional Report, XXV FIDE Congress, 30 May – 2 June 2012, p. 44.

4. Commission of the European Communities, memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, Bulletin Supplement 2/79, COM(79)210 final.

5. Opinion 2/94, *Accession to the ECHR* [1996] ECR I-1759.

6. Cf. especially Art. 17 of Protocol No. 14, amending Art. 59 ECHR, thus allowing for accession.

7. Cf. especially Art. 6(2) TEU, both enabling and obliging the EU to accede to the Convention.

8. 47+1(2013)008rev2, Final Report to the CDDH, 10 June 2013.

9. Explanatory Report, 47+1(2013)008rev2.

10. Lock, "End of an epic? The draft agreement on the EU's accession to the ECHR", 31 YEL (2012), 162–197.

11. Jacqué, "The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", 48 CML Rev. (2011), 995–1023, 995.

12. Stubberfield, "Lifting the organisational veil: Positive obligations of the European Union following accession to the European Convention on Human Rights", 19 *Australian International Law Journal* (2012), 117.

13. ECtHR, *Bosphorus v. Ireland*, Appl. No. 45036/98, judgment of 30 June 2005, para 155.

enforcement of fundamental rights within this system.<sup>14</sup> By and large, accession will entitle any person, non-governmental organization or group of individuals to submit the acts, measures and omissions of the European Union, like those of every other High Contracting Party, to the external control of the ECtHR in the light of the rights enshrined in the Convention – which is even more important due to the transfer of substantial powers from the Member States to the EU. Furthermore, it will also enable the ECJ to apply the Convention directly, without taking recourse to the general principles under Article 6(3) TEU. This will allow the EU to play a full role in proceedings in Strasbourg in cases involving EU law and cement more firmly the role and decisions of the ECtHR in the Union legal order.<sup>15</sup> Concurrently, the negotiators of the Accession Agreement tried to take into account that the autonomy of EU law should not be prejudiced by the Agreement itself and the subsequent case law of the Strasbourg Court, especially since the Court of Justice of the EU as well as the courts of the EU Member States are also obliged to ensure the observance and protection of human rights within the Union legal system (under the principle of subsidiarity in Art. 35(1) ECHR).<sup>16</sup>

In twelve clearly arranged articles, the Accession Agreement contains two categories of provisions. The first category comprises modifications to the Convention itself, which will be rendered obsolete after the entry into force of the Accession Agreement and the eventual modification of the Convention.<sup>17</sup> These modifications are, however, kept to a necessary minimum, as the current control mechanism of the Convention should, as far as possible, be preserved and applied to the Union in the same way as to the other High Contracting Parties.<sup>18</sup> The second category of provisions governs the status of the EU as a High Contracting Party to the Convention, and will remain valid alongside the Convention after accession in a manner comparable to that of a substantive additional Protocol.<sup>19</sup> Even though the Union should accede to the ECHR on an equal footing with the other High Contracting Parties, the Accession Agreement correctly acknowledges that the EU is not a sovereign nation-State and that therefore, certain adaptations (among them, most importantly, the co-respondent mechanism and the prior involvement of the

14. Grewe, “Beitritt der EU zur EMRK und ZP 14: Wirksame Durchsetzung einer gesamteuropäischen Grundrechteverfassung?”, 47 EuR (2012), 285–308, 288.

15. Besselink, “The protection of fundamental rights post-Lisbon: The interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions”, General Report, XXV FIDE Congress, 30 May – 2 June 2012, p. 35.

16. Explanatory Report, cited *supra* note 9, paras. 5–6.

17. Obwexer, op. cit. *supra* note 2, p. 125.

18. Explanatory Report, cited *supra* note 9, para 7.

19. Obwexer, op. cit. *supra* note 2, p. 125.

ECJ) are necessary in order to allow the future functioning of the ECHR system.<sup>20</sup>

Despite the enormous efforts of the Accession Agreement, accession itself may not take place as swiftly as some may hope for,<sup>21</sup> as many legal problems still need to be solved. The Agreement could, for instance, in no way foretell and take into consideration all the legal consequences of accession or how the cooperative relationship between the ECJ and the ECtHR might change.<sup>22</sup> And although this contribution assumes that the Accession Agreement is compatible with the EU Treaties, and that the negotiators tried as best as possible to make allowances for the autonomy of the EU legal order, there is no telling whether the Accession Agreement does in fact live up to these high expectations. In July 2013, the ECJ has been requested by the European Commission under Article 218(11) TFEU to give an opinion on the question whether the Accession Agreement is in fact compatible with the Treaties.<sup>23</sup> At the time of writing, *Opinion 2/13* was still in progress and therefore not available for further analysis or speculation with regard to its result.

This article can only cover a selection of the most pressing legal issues involved, since a complete analysis would render it far too long. Section 2 therefore examines the scope and legal effects of accession, both for the EU and the Convention system (Arts. 1, 2, 10, and 11 AA), whilst section 3 deals with the procedural aspects of accession (the co-respondent mechanism, inter-Party cases, and the prior involvement procedure) and their relation to the Union's legal autonomy (Arts. 3 to 5 AA). Section 4 highlights the institutional interlacing of the EU and the Council of Europe and the EU's future involvement in the latter's bodies, e.g. the Parliamentary Assembly (for the election of ECtHR judges; Art. 6 AA) and the Committee of Ministers (in order to participate in the supervision of enforcement of ECtHR judgments; Art. 7 AA). The EU's future participation in the expenditure related to the Convention (Art. 8 AA) and the EU's relations with other agreements (Art. 9 AA) do not raise substantial legal issues in this respect and will therefore be disregarded here. Similarly, Article 12 AA merely contains a typical final clause included in treaties prepared under the auspices of the Council of Europe and consequently does not require any assessment.

20. Explanatory Report, cited *supra* note 9, para 7.

21. Lock, *op. cit.* *supra* note 10, p. 163.

22. Eckes, "EU Accession to the ECHR: Between autonomy and adaptation", 76 MLR (2013), 254–285, 255.

23. *Opinion 2/13, Agreement on EU accession to the ECHR*, request for an Opinion by the European Commission, 4 July 2013, O.J. C 260/32, 7 Sept. 2013.

## 2. Scope and legal effects of accession

### 2.1. *Scope of accession*

Article 1 AA straightforwardly states that the EU accedes to the Convention and will become a Party to it upon entry into force of the Accession Agreement (Art. 10(4) AA), which means that there is no further requirement to deposit a separate instrument of accession.<sup>24</sup> Moreover, the Union will concurrently accede to the Protocol to the Convention<sup>25</sup> and to Protocol No. 6.<sup>26</sup> This approach of the “least common denominator”<sup>27</sup> has been chosen so as to maintain the principle of neutrality with regard to the Member States, thus avoiding any risk of challenging any Member State action within the scope of EU law in relation to a Protocol which the Member State in question has not ratified. The negotiators consequently opted to limit EU accession to those Protocols to which all the Member States are already parties (i.e. Protocols No. 1 and No. 6).<sup>28</sup> Should the Union wish to accede to the other Protocols containing substantive rights (i.e. Protocols No. 4,<sup>29</sup> 7,<sup>30</sup> 12,<sup>31</sup> and 13<sup>32</sup>), which have not been ratified by all Member States, it will need to deposit separate accession instruments<sup>33</sup> and comply with the procedure set forth in Article 218 TFEU. To this end, it will not be necessary to conclude another Accession Agreement, since the existing Accession Agreement already covers accession to the other Protocols in substantive terms<sup>34</sup> in

24. Explanatory Report, cited *supra* note 9, para 17.

25. Commonly referred to as Protocol No. 1 (ETS No. 9) safeguarding certain rights as diverse as the right to property, the right to education, and the right to free elections.

26. Protocol No. 6 (ETS No. 114) concerning the abolition of the death penalty in times of peace.

27. Gragl, *The accession of the European Union to the European Convention on Human Rights* (Hart, 2013), p. 94.

28. Jacqué, *op. cit. supra* note 11, 1004.

29. Protocol No. 4, guaranteeing the freedom of movement, prohibition of collective expulsion of aliens and the prohibition of imprisonment for debt, has not been ratified by Greece and the United Kingdom.

30. Protocol No. 7 containing the procedural safeguards for expulsion of aliens, the right of appeal to a higher court, compensation for wrongful conviction, the principle of double jeopardy or *ne bis in idem* and the equality between spouses, has not been ratified by Germany, the Netherlands, and the United Kingdom.

31. Protocol No. 12 safeguarding the general prohibition of discrimination, was only ratified by Croatia, Cyprus, Finland, Luxembourg, the Netherlands, Romania, Slovenia, and Spain.

32. Protocol No. 13 enshrining the abolition of the death penalty in all circumstances, was not ratified by Poland.

33. Explanatory Report, cited *supra* note 9, para 17.

34. Obwexer, *op. cit. supra* note 2, p. 142.



Article 1(2)(a) AA, providing that accession to the other Protocols shall be governed, *mutatis mutandis*, by the respective provisions of these Protocols.<sup>35</sup>

There are, however, two scenarios with respect to the additional Protocols which could raise significant legal issues. The first scenario relates to cases where individuals rely on certain rights enshrined in the Charter,<sup>36</sup> which are tantamount to rights set forth in a Protocol other than Protocol No. 1 or No. 6 (i.e. a Protocol that has not been ratified by all Member States). A delicate issue can be found, for instance, in Article 4 of Protocol 4 to the ECHR, the prohibition of collective expulsion of aliens, which corresponds to Article 19(1) of the Charter.<sup>37</sup> The ECJ could either strictly adhere to the wording of the Accession Agreement and only apply the provisions of those Protocols to which the Union has actually acceded, or it may engage in judicial activism<sup>38</sup> and conclude that the other Protocols are also covered by the corresponding Charter provisions<sup>39</sup> – a course of action which is also supported by the Charter Explanations expressly stating that “[t]he reference to the ECHR covers both the Convention and the Protocols to it”.<sup>40</sup> Advocate General Cruz Villalón has nevertheless called for a partially autonomous interpretation of those Charter rights corresponding to rights set forth in Protocols which have not been ratified by all Member States (e.g. the principle of *ne bis in idem*; Art. 50 of the Charter and Art. 4 of Protocol No. 7 to the Convention).<sup>41</sup>

With respect to the second scenario, it remains uncertain how the ECtHR will decide when requested to adjudicate upon an application against an EU Member State for violating – whilst implementing Union law – a right set forth in a Protocol to which the Union has not acceded, but which the Member State in question has in fact ratified. It was suggested that in such a case the Strasbourg Court could reactivate its *Bosphorus* formula<sup>42</sup> and assess whether the protection offered by the EU was manifestly deficient or not.<sup>43</sup> Having said that, however, Strasbourg is probably best advised to eventually abandon

35. These are: Art. 7 of Protocol No. 4, Arts. 8–10 of Protocol No. 7, Arts. 4–6 of Protocol No. 12, and Arts. 6–8 of Protocol No. 13. Cf. also Explanatory Report, 47+1(2013)008rev2, cited *supra* note 9, para 20.

36. Art. 52(3) of the Charter refers back to the Convention for cases where the Charter “contains rights which correspond to rights guaranteed by the Convention.”

37. Explanations relating to the Charter of Fundamental Rights, O.J. C 303/02, 14 December 2007, p. 24.

38. Gragl, *op. cit. supra* note 27, p. 95.

39. Jacqué, *op. cit. supra* note 11, 1004.

40. Explanations relating to the Charter of Fundamental Rights, cited *supra* note 37, p. 33.

41. Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, judgment of 26 Feb. 2013, nyr, Opinion of A.G. Cruz Villalón, paras. 70–96.

42. ECtHR, *Bosphorus*, cited *supra* note 13, para 155.

43. Jacqué, *op. cit. supra* note 11, 1005.

the *Bosphorus* doctrine, as shielding the EU from its scrutiny undermines the very objective of the Union's accession to the Convention.<sup>44</sup>

## 2.2. Legal effects of accession

### 2.2.1. For the European Union

#### – Judgments by the European Court of Human Rights

The most obvious legal effect of EU accession to the Convention will be that the decisions of the ECtHR in cases to which the EU is party will be binding on all EU institutions (including the ECJ<sup>45</sup>).<sup>46</sup> Article 46 ECHR evidently provides that the High Contracting Parties must abide by the final judgment of the ECtHR in all cases to which they are parties, which also applies to the European Union and all of its executive, legislative, and judicial organs after accession.<sup>47</sup>

Yet, there are two legal issues in relation to ECtHR judgments on alleged violations of the Convention by the EU. Firstly, fears have been voiced that the Strasbourg Court might undertake a binding interpretation of Union law and thus encroach upon the EU's legal autonomy within the meaning of *Opinion 1/91*,<sup>48</sup> particularly in cases where the ECtHR must closely scrutinize domestic law (e.g. in cases involving the interpretation of Arts. 5, 8–10, and 13 ECHR, which expressly mention domestic law as a standard of lawfulness).<sup>49</sup> However, this would only jeopardize the autonomy of EU law if the ECtHR determined the content of Union law in an internally binding fashion<sup>50</sup> – which is never the case, as “it is primarily for the national authorities, notably the courts, to interpret and apply domestic law....”<sup>51</sup> Beyond that, the ECJ would always have the first chance to decide on the interpretation of Union law before the ECtHR might do so: either due to the rule that internal remedies be exhausted before calling upon the Strasbourg Court (Art. 35 ECHR),<sup>52</sup> or – in case a Member State court neglects to request

44. Besselink, op. cit. *supra* note 15, p. 37.

45. Cf. Opinion 1/91, *European Economic Area I (EEA I)* [1991] ECR I-6079, para 39, and Opinion 1/92, *European Economic Area II (EEA II)* [1992] ECR I-2821, para 33.

46. Explanatory Report, 47+1(2013)008rev2, cited *supra* note 9, para 26.

47. Meyer-Ladewig, *EMRK-Handkommentar*, 3rd ed (Nomos, 2011), Art. 46, para 22.

48. Opinion 1/91, cited *supra* note 45, para 39.

49. De Schutter, “L’adhésion de l’Union européenne à la Convention européenne des droits de l’homme: Feuille de route de la négociation”, 83 *Revue Trimestrielle des droits de l’homme* (2010), 535–571, 551–552.

50. Lock, “Walking on a Tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order”, 48 *CML Rev.* (2011), 1025–1054, 1034–1035.

51. ECtHR, *Huvig v. France*, Appl. No. 11105/84, judgment of 24 April 1990, para 28.

52. ECommHR, *Dufay v. The European Communities, alternatively: Their Member States a) jointly and b) severally*, App. No. 13539/88, decision of 19 Jan. 1989.

a preliminary ruling and the applicant then submits its complaint directly to the ECtHR – on basis of the prior involvement of the ECJ under Article 3(6) AA.<sup>53</sup> Since the ECtHR would never perform an original interpretation of Union law, it would not determine its interpretation in an internally binding manner and thence not endanger the Union's legal autonomy.<sup>54</sup>

Secondly, following the respective ECJ case law on the direct applicability of decisions of international treaty bodies,<sup>55</sup> the question has been raised whether ECtHR decisions might also be directly applicable within the Union legal order<sup>56</sup> and would thus possibly invalidate secondary EU law in contravention to the Convention. Given the ECJ's exclusive jurisdiction in declaring Union acts invalid,<sup>57</sup> any decision by the Strasbourg Court on the validity of Union law would clearly encroach upon the EU's legal autonomy. However, Strasbourg's judgments are declaratory in nature and concern individual cases; even if they were directly applicable within the domestic legal orders of the High Contracting Parties (as interpretations of the Convention), they would not be capable of invalidating municipal legal acts.<sup>58</sup> The power of the Convention system lies in the wording of Article 46 ECHR and its binding force on the High Contracting Parties, which are obligated to comply with Strasbourg's decisions. This power, however, does not stem from any invalidating effect, but from the High Contracting Parties' lawful compliance with their obligations under the Convention.

– *The legal status of the ECHR and the Accession Agreement after accession*

The Accession Agreement will be concluded as a treaty between the forty-seven High Contracting Parties to the Convention (including the 28 EU Member States) on the one hand and the European Union on the other.<sup>59</sup> Since public international law leaves the arrangement of relationships between international law and domestic law via *renvoi* to the latter,<sup>60</sup> and the Accession Agreement is entirely silent on this matter, it is not instantly evident what legal status the Convention and the Agreement itself will have within the EU's normative hierarchy after accession.

53. The prior involvement procedure is discussed in detail in section 3.3. *infra*.

54. Lock, op. cit. *supra* note 50, 1036.

55. Case C-192/89, *Sevince v. Staatssecretaris van Justitie* [1990] ECR I-3461, para 15.

56. Obwexer, op. cit. *supra* note 2, 146.

57. Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para 15.

58. Lock, op. cit. *supra* note 50, 1036.

59. Obwexer, op. cit. *supra* note 2, 125.

60. Wildhaber and Breitenmoser, "The relationship between customary international law and municipal law in western European countries", 48 *ZaöRV* (1988), 163–207, 164.

According to the ECJ's settled case law, international agreements form – in a quasi-monist fashion<sup>61</sup> – an integral part of EU law<sup>62</sup> and rank on a “mezzanine”<sup>63</sup> level between primary and secondary EU law,<sup>64</sup> thus binding the EU and its institutions both externally under public international law<sup>65</sup> and internally pursuant to Article 216(2) TFEU. Thereby, both the Convention and the Accession Agreement will – as an integral part of EU law – also enjoy the same supremacy over the Member States' legal orders as “genuinely” created Union law.<sup>66</sup> This means that national courts are required to disapply domestic law in the event of conflict with Convention rights in their manifestation as Union law. Moreover, since the Convention contains “clear and precise obligation[s], which [are] not subject, in [their] implementation or effects, to the adoption of any subsequent measure”,<sup>67</sup> and clearly understandable rights for individuals, the Convention will arguably be directly applicable and have self-executing effects for both individuals and government authorities. Lastly, as international treaties in the form of “Unionized” international law are part of “the law”<sup>68</sup> as set forth in Article 19(1) TEU, the Convention and the Accession Agreement will, after accession, also be encompassed in the jurisdiction of the ECJ. As a result, it will primarily be the duty of the Luxembourg Court to interpret and apply the Convention as part of EU law and to ensure, under the principle of subsidiarity, an effective protection of human rights within the Union legal order before any cases can be submitted to the ECtHR.<sup>69</sup>

61. Kuijper and Bronckers, “WTO Law in the European Court of Justice”, 42 CML Rev. (2005), 1313–1355, 1314; cf. however, Peters, “The position of international law within the European Community legal order”, 40 *German Yearbook of International Law* (1997), 9–77, 28–29, and Tietje, “The status of international law in the European Legal order: The case of international treaties and non-binding international instruments”, in Wouters, Nollkaemper, and de Wet (Eds.), *The Europeanisation of International Law* (TMC Asser Press, 2008), p. 58, arguing that EU law does not truly follow a dualist model, but not a monist one either.

62. Case 181/73, *Haegeman v. Belgian State* [1974] ECR 449, para 5.

63. Kumin, “Die Verhandlungsvorbereitungen für den Beitritt der Europäischen Union zur Europäischen Menschenrechtskonvention – Ein Erfahrungsbericht”, in Stadlmeier (Ed.), *Von Lissabon zum Raumfahrzeug: Aktuelle Herausforderungen im Völkerrecht – Beiträge zum 35. Österreichischen Völkerrechtstag* (Neuer Wissenschaftlicher Verlag, 2011), pp. 65–86, 73.

64. Case C-61/94, *Commission v. Germany (International Dairy Agreement)* [1996] ECR I-3989, para 52.

65. Case 104/81, *Kupferberg & Cie. KG (Kupferberg I)* [1982] ECR 3641, para 14.

66. Thym, “Auswärtige Gewalt” in Von Bogdandy and Bast (Eds.), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge*, 2nd ed. (Springer, 2009), p. 457.

67. Case 12/86, *Demirel* [1987] ECR 3719, para 14.

68. Case C-280/93, *Germany v. Council (Bananas – Common Organization of the Markets)* [1994] ECR I-4973, para 144; Case C-149/96, *Portugal v. Council (Market Access in Textile Products)* [1999] ECR I-8395, paras. 47–51.

69. Gragl, op. cit. *supra* note 27, pp. 98–99.

The choice to incorporate the Convention into the EU legal order as an international treaty between primary and secondary might entail certain risks. It has been criticized that this specific legal status could result in legal problems between the EU's "own" fundamental rights on the level of primary law (i.e. the Charter by virtue of Art. 6(1) TEU, and the general principles of law under Art. 6(3) TEU) and the Convention rights on the mezzanine level, inferior to primary law. In particular, the constitutional significance of accession for the Union, as emphasized by the ECJ itself in its Opinion 2/94,<sup>70</sup> supports the view that a "constitutional" rank for the Convention would have been more appropriate<sup>71</sup> than simply labelling the Convention as a mere international agreement.<sup>72</sup>

Having said that, however, one must bear in mind that the Convention need not rank at a primary law level in order to guarantee an effective protection of human rights. Apart from Austria (where the Convention forms part of the Constitution<sup>73</sup>), and the Netherlands (where it even ranks superior to the Constitution<sup>74</sup>), the Convention is usually on a par with ordinary, non-constitutional, statutory law.<sup>75</sup> Therefore it does not seem necessary for the Convention to be of constitutional status within the Union legal order. Moreover, the Convention merely constitutes the bottom threshold of human rights protection for its High Contracting Parties, including the EU, and leaves it to them to provide an even more extensive standard of protection – as laid down in the second sentence of Article 52(3) of the EU Charter.<sup>76</sup> In fact, if the Convention ranked on the same hierarchical level as the Charter, this could result in judicial divergences in the ECJ's case law, normative conflicts, and legal uncertainty, since the EU would be simultaneously bound by a higher

70. Opinion 2/94, cited *supra* note 5, para 35.

71. Grewe, *op. cit. supra* note 14, 296.

72. Weiß, "Human rights in the EU: Rethinking the role of the European Convention on Human Rights after Lisbon", 7 ECLR (2011), 64–95, 72, and Naumann, "Art. 52 Abs. 3 GrCH zwischen Kohärenz des europäischen Grundrechtsschutzes und Autonomie des Unionsrechts", 43 EuR (2008), 424–435.

73. Grabenwarter, *Europäische Menschenrechtskonvention*, 4th ed. (C.H. Beck, 2009), § 3, para 2; the Convention was retroactively granted constitutional status in 1964 via federal statute, cf. BGBl. 1964/59.

74. Van Dijk, "Domestic status of human rights treaties and the attitude of the judiciary – the Dutch case" in Nowak, Steurer and Tretter (Eds.), *Festschrift für Felix Ermacora: Fortschritt im Bewusstsein der Grund- und Menschenrechte* (N.P. Engel, 1988), pp. 638–639.

75. Cf. e.g. Keller and Stone Sweet (Eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP, 2008); and Blackburn and Polakiewicz (Eds.), *Fundamental Rights in Europe* (OUP, 2001).

76. Borowsky, "Art. 52", in Meyer (Ed.), *Charta der Grundrechte der Europäischen Union* (Nomos, 2010), para 30b.

and a lower standard of fundamental rights protection, not knowing which one to apply in a given case.<sup>77</sup>

– *The principle of neutrality and the EU-internal division of competences*

The second sentence of Article 6(2) TEU and Article 2 of Protocol No. 8 to the Treaties require that accession should not affect the Union's competences or the powers of its institutions, as defined in the Treaties,<sup>78</sup> especially with regard to the Member States. Article 1(3) AA takes due account of this principle of neutrality *vis-à-vis* the division of competences between the Union and its Member States, providing that accession "shall impose on the European Union obligations with regard only to acts, measures or omissions on its institutions, bodies, offices or agencies, or of persons acting on their behalf. Nothing in the Convention or the Protocols thereto shall require the [EU] to perform an act or adopt a measure for which it has no competence under [EU] law."

This clause is, nonetheless, merely a symbolic promise to soothe Member States' concerns of losing sovereignty and competences to the Union. National governments are worried that, after accession, the ECJ might expand its competences in the field of fundamental rights at the expense of the Member States.<sup>79</sup> The Member States, however, ignore the fact that an agreement under international law imposes certain duties upon the Contracting Parties, but it does not govern the internal rules of allocating competences between them and the organization in question. In addition, if legal acts by the Union are reviewed with respect to their accordance with fundamental rights under the first half of the first sentence of Article 51(1) of the Charter, the internal division of competences between the Union and the Member States is not affected at all. In this context, conflicts may arise in situations where the Member States are bound by the Union's fundamental rights, according to the second half of the first sentence of Article 51(1) of the Charter; in other words when they are implementing Union law. In *Åkerberg Fransson*,<sup>80</sup> however, the ECJ decided that the Member States are bound by the Charter and EU fundamental rights whenever their legislation falls within the scope of EU law. As this concept is still not clearly defined, the Luxembourg Court has practically undermined the safety valve of Article 51(1) of the Charter, which the Member States had deliberately inserted into

77. Gragl, *op. cit. supra* note 27, p. 100.

78. Cf. also Explanatory Report, cited *supra* note 9, para 22.

79. Winkler, *Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention* (Nomos, 2000), pp. 116–117.

80. *Åkerberg Fransson*, cited *supra* note 41, paras. 16–31.

the Charter in order to limit the competences of the ECJ.<sup>81</sup> Yet, according to Article 51(2) of the Charter, no new obligations will be created for the Member States, nor will the Charter relocate any powers at their expense,<sup>82</sup> as the Member States are already legally bound by the Convention and their international obligations *before* accession when implementing Union law<sup>83</sup> – especially since the ECJ ruled in *McB* that “it follows from Article 52(3) of the Charter that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR”.<sup>84</sup> This means, in a nutshell, that the ECJ should follow Strasbourg’s case law even before accession<sup>85</sup> and that, in this regard, there will not be any profound changes for the Member States.

– *The need for further EU-internal rules*

Accession will mostly be governed by the Accession Agreement, and not by amendments to the Convention.<sup>86</sup> Since the Agreement will continue to have legal effects even after accession, the EU is required to adopt specific internal legal rules to govern various matters with respect to accession, in particular in relation to the co-respondent mechanism and the prior involvement of the ECJ.<sup>87</sup> The requirement to adopt further internal rules will not endanger the legal autonomy of the EU legal order, since the actual procedure of adopting and implementing these rules lies within the discretion of the Union in order to maintain its distinctive legal features.<sup>88</sup>

2.2.2. *For the ECHR system*

– *Amendments to Article 59 ECHR*

One significant change entailed by EU accession to the Convention is the necessity of modifications to the text of the Convention itself. From a rather “technical” viewpoint, it is interesting to note that Article 1(2) AA modifies Article 59(2) ECHR in order to allow for EU accession, whilst the EU joins the circle of High Contracting Parties to the Convention at the very moment the

81. Lavranos, “The ECJ’s Judgments in Melloni and Åkerberg Fransson: Une ménage à trois difficile”, 3 *European Law Reporter* (2013), 133–141, 139.

82. But cf. the ambiguous reference to Art. 51(2) of the Charter in Case C-400/10 PPU, *J. McB. v. L.E.* [2010] ECR I-8965, paras. 51 and 59.

83. Obwexer, op. cit. *supra* note 2, 126.

84. *J. McB.* cited *supra* note 82, para 53.

85. Eckes, op. cit. *supra* note 22, p. 278.

86. Cf. Art. 1(2) AA.

87. Explanatory Report, cited *supra* note 9, para 21.

88. Gragl, op. cit. *supra* note 27, p. 96.



Accession Agreement enters into force.<sup>89</sup> Firstly, a new Article 59(2)(a) ECHR will permit the EU to accede to the Protocols of the Convention by stating that the provisions of the Protocols concerning signature and ratification, entry into force and depositary functions<sup>90</sup> shall apply, *mutatis mutandis*, in the event of the EU's accession to those Protocols.<sup>91</sup> More importantly, however, Article 1(2) AA also introduces a new Article 59(2)(b) ECHR, which provides that the Accession Agreement constitutes an integral part of the Convention. This means *in concreto* that both the Convention and the Accession Agreement will form a treaty "package" which makes it possible to limit the amendments made to the Convention itself (e.g., interpretation clauses are covered by the relevant provisions of the Agreement and will not be incorporated into the Convention). Given this treaty "package" of Convention and Accession Agreement, it will not be possible for any High Contracting Party to denounce the Agreement separately from the Convention; *vice versa*, denunciation of the Convention is tantamount to a denunciation of the Accession Agreement.

Lastly, due to the continuing legal effect of the Agreement after the EU's future accession to the Convention, its provisions will be subject to interpretation by the ECtHR, whose rules of procedure also require according adaptation.<sup>92</sup>

The requirement for prior amendment to the Convention in order to allow for the accession of a new High Contracting Party is very unusual and in fact unprecedented in the context of the Convention as, to date, amendments to the text of the Convention and accessions have always taken place separately in time. Therefore it has been remarked that the Accession Agreement bears more technical legal similarities with the accession agreements of States to the EU than previous amending Protocols to the Convention.<sup>93</sup>

#### – Rules on attributability for the ECtHR

Given the strict preconditions enshrined in Article 6(2) TEU and Article 2 of Protocol No. 8 to the Treaties that accession must not affect the division of competences between the EU and the Member States, the ECtHR must not determine this division by adjudicating upon the question of which entity

89. Králová, "Comments on the draft agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms", 2 *Czech Yearbook of Public & Private International Law* (2012), 127–142, 131.

90. See *supra* note 35, and Art. 6 of the Protocol and Arts. 7–9 of Protocol No. 6.

91. Explanatory Report, cited *supra* note 9, para 20. Cf. the analyses below on the co-respondent mechanism and the prior involvement procedure for further details.

92. Explanatory Report, cited *supra* note 9, para 21.

93. Eckes, *op. cit. supra* note 22, 265.



(either the EU or the Member State) was in fact responsible for an alleged violation of the Convention. Only the ECJ is given jurisdiction to assess questions of competence.<sup>94</sup>

Yet, as the correct attribution of conduct or omission to a High Contracting Party by the ECtHR is a prerequisite for ascertaining a violation of the Convention,<sup>95</sup> Article 1(4) AA further defines the attributability of acts, measures or omissions of the Member States allegedly in violation of the Convention, and thus, for the sake of consistency, lays down rules parallel to those of EU law.<sup>96</sup> This provision provides that, when implementing EU law, including decisions taken under primary law, such acts, measures or omissions of organs of an EU Member State or of persons acting on its behalf “shall be attributed to that [Member] State.” Principally if persons employed or appointed by a Member State take action within the framework of an operation pursuant to a decision of an EU institution, their acts, measures and omissions will be attributed to the Member State in question.<sup>97</sup> Such attribution will of course not preclude the EU from joining the procedures before the ECtHR and from being responsible as a co-respondent for a violation. This model of attribution clearly reflects the ECtHR’s line of reasoning in the *Matthews* case, in which Strasbourg held that the Convention does not bar the Contracting Parties from transferring competences to international organizations (such as the EU) by concluding international agreements (such as the Union Treaties), provided that the Convention rights continue to be “secured”. In this case, the Member States’ responsibility continues, even after such a transfer of powers,<sup>98</sup> which means that they cannot escape their responsibilities under the Convention by outsourcing competences to the European Union.

Acts, measures and omissions of the Union institutions, bodies, offices or agencies, or of persons acting on their behalf, conversely, will be attributed – analogously to the rules of EU law under Article 340(2) TFEU<sup>99</sup> – to the EU itself. This applies to acts, measures or omissions, regardless of the context in which they occur, also including matters relating to the EU Common Foreign

94. Lock, op. cit. *supra* note 50, 1042.

95. Eckes, op. cit. *supra* note 22, 265–266.

96. Cf. especially Joined Cases C-6 & 9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357, paras. 31 et seq.; Joined Cases C-46 & 48/93, *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, para 17; Case C-224/01, *Köbler v. Austria* [2003] ECR I-10239, paras. 30–40.

97. Explanatory Report, cited *supra* note 9, para 23.

98. ECtHR, *Matthews v. United Kingdom*, Appl. No. 24833/94, judgment of 18 Feb. 1999, para 32.

99. Cf. e.g. Case C-370/89, *SGEEM and Etroy v. EIB* [1992] ECR I-6211, para 15; Joined Cases 7/56, 3–7/57, *Algera*, [1957] ECR 39, pp. 66–67; Case T-547/93, *Lopes v. Court of Justice* [Staff Cases 1996] I-A-63, II-185.

and Security Policy (CFSP).<sup>100</sup> This system of attribution is modelled after Strasbourg's *Bosphorus*<sup>101</sup> judgment in which the ECtHR clarified that the EU Member States cannot be held responsible for alleged violations of the Convention, if (1) such acts are based on EU law, i.e. the State is implementing Union legislation; (2) the State does not enjoy any discretion in doing so; and (3) as long as the EU can be regarded to protect fundamental rights in a manner which can be considered at least equivalent to that provided by the Convention if Member State action is taken in compliance with obligations under EU law.<sup>102</sup> In other words, whereas the Member States remain responsible for acts and decisions taken under primary law, which are international treaties freely concluded and entered into by them, the EU will principally be responsible for violations of the Convention by its own legislation, i.e. secondary law. Only if secondary EU law leaves the Member States a certain margin of discretion with regard to its implementation can the Member States be held responsible for contravening the Convention.<sup>103</sup> *Vice versa*, in any of these cases, neither the EU nor the Member States are precluded from joining the proceedings as co-respondents.<sup>104</sup>

The additional benefit of these new rules of attributing responsibility to either a Member State or the Union lies in the fact that, so far, the ECtHR has not given a specific rule on attribution of such acts or measures to either the international organization concerned or the Contracting Party in question in any of the cases in which it decided on the attribution of acts or measures by Contracting Parties operating in the framework of an international organization (especially the United Nations).<sup>105</sup> In *Behrami and Saramati*, for example, the ECtHR had to decide whether certain alleged human rights violations in Kosovo were in fact attributable to France and Norway, the two States acting under the auspices of the UN in this case. The ECtHR eventually held that the acts in question had been committed by the States in their functions under the United Nations Interim Administration Mission in Kosovo (UNMIK) and the UN-authorized security presence in Kosovo (KFOR). Consequently, as France and Norway had been under the ultimate authority and control of the UN, these acts were attributable to the UN and not to the individual States involved in the actual operations.<sup>106</sup> Having noted that the

100. Explanatory Report, cited *supra* note 9, para 23.

101. ECtHR, *Bosphorus*, cited *supra* note 13.

102. *Ibid.*, para 155.

103. ECtHR, *MSS v. Belgium and Greece*, Appl. No. 30696/09, judgment of 21 Jan. 2011, para 338.

104. Explanatory Report, cited *supra* note 9, para 23.

105. *Ibid.*, para 24.

106. ECtHR, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Appl. No. 714120/01, judgment of 2 May 2007, para 134.

UN was not a Contracting Party to the Convention, Strasbourg declined jurisdiction in the case<sup>107</sup> and, surprisingly, did not have recourse to its own judgment in *Bosphorus* in order to exercise jurisdiction over acts of States carried out on behalf of the UN, if the standard of human rights protection fell below the threshold of the Convention.<sup>108</sup> In *Al-Jedda*, however, the ECtHR held – despite the similarities of this case to *Behrami and Saramati* – that the United Kingdom was responsible for the unlawful internment of a man by its troops deployed as part of the UN-authorized Multinational Force in Iraq, since the invasion of Iraq had not been a United Nations mission in the first place and the UN had no ultimate authority and control in this case.<sup>109</sup>

With regard to the attribution of responsibility to either the EU or a Member State, the Accession Agreement provides a clear and transparent rule of attributability. If a case comparable to *Behrami and Saramati* arises after accession, the EU would undoubtedly be responsible for any violation of the Convention if their agents act on behalf of the Union and are under its control,<sup>110</sup> whereas in a case similar to *Al-Jedda*,<sup>111</sup> one may assume that one or more Member States alone would be held responsible for any breaches of the Convention.

– *Extent of Control Exercised by the ECtHR*

The main reason for accession is so that individual applicants have the right to submit complaints against the EU regarding alleged violations of the Convention to the ECtHR. Such violations can be rooted in any executive actions or omissions of the EU organs, the decisions of the EU courts, in secondary law, or primary law.<sup>112</sup> Since secondary law is tantamount to Union legislation, initiated by the Commission and enacted by the Council and the Parliament, it can ultimately be annulled by the ECJ if the ECtHR finds it to violate the Convention.<sup>113</sup> In contrast to that, the potential modification of primary law in violation of the Convention is a very different cup of tea. Primary law is based on international treaties, concluded by and entered into by the Member States, and can only be modified by the Member States under Article 48 TEU. Moreover, due to the absence of explicit provisions allowing the ECJ to invalidate provisions of primary law, that Court is in fact powerless

107. *Ibid.*, para 147.

108. ECtHR, *Bosphorus*, cited *supra* note 13.

109. ECtHR, *Al-Jedda v. United Kingdom*, Appl. No. 27021/08, judgment of 7 July 2011, para 82.

110. Jacqu , op. cit. *supra* note 11, 1005–1006.

111. *Al-Jedda*, cited *supra* note 109.

112. Lock, op. cit. *supra* note 50, 1034.

113. Gragl, op. cit. *supra* note 27, pp. 132–133.

to remedy any violations of the Convention stemming from primary Union law. Consequently, since the EU lacks any *Kompetenz-Kompetenz* to amend its own constitutional basis, it has been argued that primary law should be exempt from Strasbourg's judicial control.<sup>114</sup>

In this context, it has also been called into question whether intergovernmental policies such as the EU's CFSP should be subject to the ECtHR's judicial supervision to the same extent as the rest of Union law.<sup>115</sup> Given the ECJ's lack of jurisdiction in the area of the CFSP (Art. 24(1) TEU),<sup>116</sup> most of the legal acts and measures enacted within the framework of the CFSP are beyond the ECJ's judicial reach, excluding review of these provisions in the light of fundamental rights protection. This means that in these specific cases the ECJ is incapable of autonomously and independently applying the standards demanded by the Convention and Strasbourg's case law, and thus preventing violations of the Convention on the "domestic" level.<sup>117</sup>

The Accession Agreement, however, does not allow for exclusion of primary law from the jurisdiction of the ECtHR. Firstly, such exclusion would be an enormous privilege for the Union, as there is no other High Contracting Party to the Convention whose constitution is exempt from Strasbourg's control. Secondly, even though Article 2(2) AA allows the EU to make reservations in respect of any particular provision of the Convention, reservations of a general character – i.e. the "immunization" of primary law from Strasbourg's jurisdiction – are not permitted. Lastly, such exclusion may require the ECtHR to delineate violations of the Convention found in primary law from violations rooted in secondary law and to decide on the exact division of powers between the EU and the Member States – which would constitute a blatant interference with the autonomy of Union law.<sup>118</sup> Moreover, the Explanatory Report clarifies that the model of attributing acts, measures and omissions of any EU institution, body, office or agency to the EU also applies to "acts, measures or omissions in whichever context they occur, including with regard to matters relating to the EU Common Foreign and

114. Köngeter, "Völkerrechtliche und innerstaatliche Probleme eines Beitritts der Europäischen Union zur EMRK", in Bast (Ed.), *Die Europäische Verfassung – Verfassungen in Europa* (Nomos, 2005), p. 245.

115. Kumin, op. cit. *supra* note 63, 76.

116. With minor exceptions concerning the delineation of intergovernmental and supranational competences within EU external policies (Art. 40 TEU) and the review of the legality of decisions providing for restrictive measures against natural or legal persons (Art. 275(2) TFEU).

117. Kumin, op. cit. *supra* note 63, 76.

118. Gragl, op. cit. *supra* note 27, pp.128–132.

Security Policy.”<sup>119</sup> This means that no area of European Union law, certainly not EU primary law or intergovernmental policies, is excluded from Strasbourg’s scrutiny and that individuals may also bring applications for alleged violations of the Convention in these fields against the Union after accession.

– *Technical Amendments to the Convention*

In order to avoid amending the substantive provisions of the Convention and the relevant Protocols, Article 1 AA adds three interpretation clauses in its paragraphs 5 to 7 in order to maintain the readability of the Convention<sup>120</sup> and to avoid cluttering the text with too many technical terms. Since the Protocols are accessory to the Convention, and their substantive provisions are to be regarded as additional articles to the Convention proper, the general interpretation clauses of the Accession Agreement will also apply to the Protocols without their needing to be amended to that effect.<sup>121</sup> Lastly, Article 1(8) AA provides that the Convention shall be amended to allow for proper notification of all Council of Europe Member States and the EU, after accession, by the Secretary General of the Council of Europe.

These interpretation clauses principally provide that notions laid down in the Convention which are regularly associated with sovereign nation-States in the Westphalian meaning of the word, such as “national security”, “national/domestic law(s)”, “life of the nation”, “administration of the State”, and “territorial integrity”, shall be understood as relating also, *mutatis mutandis*, to the internal legal order of the EU as a non-State Party to the Convention. The expression “internal law” (in Arts. 41 and 52 ECHR), however, did not require a separate interpretation clause, since this expression will be equally applicable to the EU as a High Contracting Party after accession.<sup>122</sup>

### 2.3. *Reservations*

The choice to base accession on an international agreement and the aspiration to treat the Union, to the greatest possible extent, on an equal footing with the other High Contracting Parties, also entitles the EU to make reservations upon accession<sup>123</sup> under the general rules of international law (Arts. 19 to 23 of the Vienna Convention on the Law of Treaties). Whereas no reservations to the

119. Explanatory Report, cited *supra* note 9, para 23.

120. *Ibid.*, para 27.

121. *Ibid.*

122. *Ibid.*, para 31.

123. Grewe, *op. cit.* *supra* note 14, 296.

Accession Agreement itself are permitted under Article 11 AA, Article 2 AA enables the Union to make reservations to the Convention and to Protocol No. 1<sup>124</sup> in accordance with Article 57 ECHR when signing or expressing its consent to be bound by the Accession Agreement. The newly amended Article 57(1) ECHR will consequently permit the EU to make reservations in respect of any particular provision of the Convention to the extent that any law of the European Union then in force is not in conformity with the provision – with the notable exception that reservations of a general character will not be permitted under Article 2 AA.

With regard to the abovementioned issue of potentially excluding primary EU law from Strasbourg’s jurisdiction, it may also be argued in this context that a reservation to exempt the entire “constitutional” layer of a High Contracting Party’s legal order might be incompatible not only with the explicit wording of Article 2 AA (and Art. 19(b) of the Vienna Convention on the Law of Treaties or its customary legal counterpart<sup>125</sup>), but also with the Explanatory Report which particularly clarifies that the expression “law of the European Union” covers both secondary EU law and primary EU law (“the Treaties”).<sup>126</sup> It thus seems that the negotiators never intended to exclude primary law from Strasbourg’s jurisdiction and that such a reservation would run foul of the overall objective and purpose of accession, which is the improvement of human rights protection in Europe.

### 3. Accession and autonomy: Procedural aspects

#### 3.1. *The co-respondent mechanism*

##### 3.1.1. *Reasons for introducing the co-respondent mechanism*

Article 3 AA introduces a new Article 36(4) ECHR and therewith an innovative mechanism to the Convention system. This mechanism enables the EU to become a co-respondent to proceedings before the ECtHR initially instigated against one or more of its Member States and, *vice versa*, also allows the EU Member States to become co-respondents to proceedings initially instigated against the EU. The overall objective of this provision is to hold both the EU and the respective Member State responsible for violations

124. However, no reservations are permitted to Protocol No. 6 in accordance with its Art. 4. Should the EU accede to other existing or future Protocols, the possibility to make reservations is governed by Art. 57 ECHR and the respective provisions of these Protocols; cf. also Explanatory Report, cited *supra* note 9, para 35.

125. Walter, “Article 19”, in Dörr and Schmalenbach (Eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012), para 133.

126. Explanatory Report, cited *supra* note 9, para 34.

of the Convention. This mechanism was deemed necessary not only to accommodate the historically unprecedented step of a non-State entity with an autonomous legal system acceding to the Convention alongside its own Member States,<sup>127</sup> but also to ensure that complaints submitted by individual applicants against the wrong entity would subsequently not be dismissed.<sup>128</sup> EU law itself, more concretely Article 1 of Protocol No. 8 to the Treaties, stipulates that the Accession Agreement must make provision for preserving the specific characteristics of the EU and its legal order, in particular with regard to “the mechanisms necessary to ensure that proceedings by... individuals are correctly addressed to Member States and/or the Union as appropriate.”

Individuals are confronted with the fact that the predominant mode of Union administration is the implementation of Union law and acts originally adopted by EU institutions by the Member States,<sup>129</sup> whereas the relevant provisions of EU primary law (i.e. the Treaties, set up and agreed upon by the Member States) are usually implemented by the Union institutions. This means that, upon EU accession to the Convention, unique and legally intricate situations may arise in which one legal act is enacted by one High Contracting Party and then implemented by another.<sup>130</sup> After accession, applicants will usually not be aware of the complexities of Union law and the exact implementation rules of EU law. Thus, they may lodge an application against a Member State allegedly responsible for a violation of the Convention, since they had only ever been in contact with the Member State’s authorities and not with the Union.<sup>131</sup> This will constitute the majority of cases, since individuals seldom engage in a direct legal relationship with the Union and its organs.

The added value of the co-respondent mechanism is that, firstly, a co-respondent will have the status of a party to the case. This means that if the ECtHR finds a violation of the Convention, the co-respondent will be bound by the obligations of Article 46 ECHR alongside the original respondent to a case. The Explanatory Report emphasizes that the co-respondent mechanism does not represent a procedural privilege for the EU and its Member States, but rather a way to avoid gaps in participation, accountability and enforceability in the Convention system – which is in fact the rationale of accession.<sup>132</sup> Secondly, the admissibility of an application will be assessed without regard to the participation of the co-respondent in the proceedings. Consequently, individual applicants are only required to exhaust the local

127. *Ibid.*, paras. 37–38.

128. Gragl, *op. cit. supra* note 27, p. 141.

129. Craig, *EU Administrative Law* (OUP, 2012), p. 28.

130. Explanatory Report, cited *supra* note 9, para 38.

131. Lock, *op. cit. supra* note 50, 1038–1039.

132. Explanatory Report, cited *supra* note 9, para 39.



remedies of either the Union *or* the Member State concerned,<sup>133</sup> not both procedural avenues – which would require the applicant to have a rather Herculean stamina, and suffer vast legal expenses. Lastly, a Member State need not raise the defence that it was not responsible for a violation because it only followed its strict obligations under EU law. If this were in fact possible, the Strasbourg Court would be compelled to interpret the exact division of competences between the EU and the Member States and would thus infringe the autonomy of EU law.<sup>134</sup> Under the new co-respondent mechanism, however, the EU may join the proceedings as a co-respondent and can subsequently be held responsible alongside the original respondent as a unity. This should in any event obviate any decision by the ECtHR on the Union-internal division of powers between the EU and the Member States.

### 3.1.2. *Scenario 1: The EU as co-respondent*

Article 3(2) AA provides that when an application is directed against one or more EU Member States, the Union may become a co-respondent to the proceedings in respect of an alleged violation of the Convention if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention, including decisions taken under the EU Treaties (TEU and TFEU), notably where that violation could have been avoided only by disregarding an obligation under EU law.

This means that the test for applying the co-respondent mechanism is fulfilled if it appears that the alleged violation of the Convention calls into question the compatibility of a provision of EU law, either primary or secondary, with the Convention rights at issue.<sup>135</sup> In other words, the mechanism can be activated if there is a normative conflict between EU law and the Convention. With regard to violations found in secondary law, the preconditions for applying this test make perfect sense, as only the EU itself can subsequently remove such a violation in its own legislation. It is, however, rather obscure why the clause “primary law” appears in this test, since it is agreed upon by the Member States and not subject to amendments by the Union itself.<sup>136</sup> The most convincing reason for this might be that the relevant provisions of the Treaties are principally being implemented by the EU institutions, which in turn entails a major responsibility for them to do so in conformity with the Convention.

The Explanatory Report additionally states that a violation of the Convention, which could only have been avoided by a Member State by

133. Ibid., para 40.

134. Lock, op. cit. *supra* note 10, 165.

135. Explanatory Report, cited *supra* note 9, para 48.

136. Lock, op. cit. *supra* note 10, 169–170.



disregarding an obligation under Union law, is most likely to emerge when a provision of EU law “leaves no discretion to a Member State as to its implementation at the national level”.<sup>137</sup> Conversely, the test for applying the co-respondent mechanism fails in cases where it would be inappropriate to include the Union as a co-respondent, for example, when EU law does not force a Member State to act in a way contrary to the Convention.<sup>138</sup> Consequently, the co-respondent mechanism would not be applicable<sup>139</sup> in cases such as *MSS v. Belgium and Greece*<sup>140</sup> where the Member States enjoyed a broad margin of discretion whether to return asylum applicants to the Member State originally responsible for examining the asylum application or whether to arrogate the case by exercising the sovereignty clause under Article 3(2) of the Dublin II Regulation.<sup>141</sup> Although the word “notably” in Article 3(2) AA may suggest that the element of normative conflict could be only one of several such elements, which have not been included in this non-exhaustive enumeration, the example of *MSS v. Belgium and Greece* demonstrates that a normative conflict between EU law and the Convention (without any discretionary leeway for the Member States) would be the only case where the EU may join the proceedings as co-respondent.

With regard to the assessment by the ECtHR and the question of the EU’s legal autonomy, it is interesting to note that Strasbourg may only determine whether it is *plausible* that the conditions for joining the parties as co-respondents are fulfilled – of course in the light of the criteria laid down in Article 3(2) AA, and without prejudice to its assessment of the merits of the case.<sup>142</sup> “Plausible” is not a very persuasive word and will consequently not prompt the ECtHR to immerse itself into the delicacies of EU law and the internal division of competences between the Union and its Member States. It will most likely content itself with the cursory assessment whether there is an evident and comprehensive nexus between Member State legislation and

137. Explanatory Report, cited *supra* note 9, para 48.

138. Submission by the AIRE Centre and Amnesty International, Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE), AI Index: IOR 61/003/2011, 14 March 2011, para 6. The document lists the following real-life cases, *inter alia*, as examples for an inappropriate inclusion of the EU as a co-respondent: ECtHR, *MSS*, cited *supra* note 103; ECtHR, *Rantsev v. Cyprus and Russia*, Appl. No. 25965/04, judgment of 7 Jan. 2010; Case C-497/10 PPU, *Mercredi v. Chaffe* [2010] ECR I-14309.

139. Lock, *op. cit.* *supra* note 10, 176.

140. ECtHR, *MSS*, cited *supra* note 103.

141. Cf. also Gragl, “The Shortcomings of Dublin II: Strasbourg’s *M.S.S.* Judgment and its implications for the European Union’s Legal Order”, in Benedek, Benoît-Rohmer, Karl and Nowak (Eds.), *European Yearbook on Human Rights 2012* (Neuer Wissenschaftlicher Verlag 2012), 123–139.

142. Explanatory Report, cited *supra* note 9, para 55.

Union law or whether an alleged violation of the Convention is rooted in the interaction of those two legal orders, without specifying any legal details in this matter.<sup>143</sup> This, again, will safeguard the autonomy of EU law, as the Strasbourg Court is not allowed to adjudicate in any way on the division of powers and attribution of responsibility between the Union and its Member States.<sup>144</sup>

### 3.1.3. *Scenario 2: The Member States as co-respondents*

Article 3(3) AA governs the reverse scenario and states that when an application is directed against the EU, the Member States may become co-respondents to the proceedings in respect of an alleged violation of the Convention, if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention of a provision of primary law, notably where that violation could have been avoided only by disregarding an obligation under the Treaties.

Again, the Strasbourg Court can join the two parties as respondent and co-respondent if it appears that there is a normative conflict between Union law and the Convention. More precisely, it may decide to do so if it appears that the alleged violation of the Convention calls into question the compatibility of a provision of primary Union law with the Convention rights at issue.<sup>145</sup> It is therefore apparent that the drafters based the second test for triggering the co-respondent mechanism on Strasbourg's *Matthews* judgment.<sup>146</sup> With regard to potential dangers to the autonomy of EU law, the same conditions as under Article 3(2) AA apply: the ECtHR can base its decision on the mere appearance of such an incompatibility between the Convention and the Union's primary law. Consequently, the only assessment Strasbourg is required to conduct is to take a look at the legal basis of the alleged violation in order to find out whether this legal basis is enshrined in the Treaties or not. Moreover, the autonomy of EU law is preserved as the ECtHR does not engage in a profound analysis of the legal roots of the alleged violation, but simply contents itself with its appearance in primary law. The ECtHR therefore does not examine what exact rank the provision in question

143. Gragl, op. cit. *supra* note 27, p. 160.

144. Obwexer, op. cit. *supra* note 2, 131–132.

145. Explanatory Report, cited *supra* note 9, para 49.

146. Cf. CDDH-UE(2011)16, 17, para 44 and fn 18: "During the negotiations, the view was expressed that in recent years, the only cases which might have certainly required the application of the co-respondent mechanism would have been *Matthews v. United Kingdom*, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* and *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands*."

has within the hierarchy of Union law, which leaves the autonomy of the Union's legal order perfectly intact.<sup>147</sup>

In this context, another interesting question arises where the Accession Agreement remains entirely silent. It does not mention whether in a case where a violation is found in primary law (i.e. international agreements concluded by the Member States), it would be necessary that simply one, some or maybe even all Member States join the proceedings as co-respondents. Even though all the Member States are in fact responsible for the provisions contained in the Treaties, the co-respondent mechanism would probably be rendered completely unworkable if proceedings involved twenty-nine Parties (the EU plus twenty-eight Member States). Thus the participation of just some Member States must necessarily suffice. This argument is additionally supported by the fact that Article 3(4) AA, which governs applications directed against both the EU and one or more of its Member States,<sup>148</sup> allows for a change of status of *any* respondent to that of co-respondent. As the conditions for becoming a co-respondent in Article 3(4) AA and Article 3(3) AA are basically identical (except for the fact that the co-respondent was, at the outset, nominated as the original respondent) there should be no substantive difference. As a result, it should also be admissible under Article 3(3) AA that only some Member States join proceedings as co-respondents.<sup>149</sup>

### 3.1.4. *Scenario 3: Applications against both the EU and one or more Member States*

The last scenario in this context covers applications directed against *both* the EU and one (or more) Member States in respect of an alleged violation. In this case, either of these respondents might, if it considers the criteria set out in Article 3(2) or (3) AA fulfilled, ask the Strasbourg Court to change its status into that of co-respondent. The High Contracting Party or Parties then changing their status to that of co-respondent could then be a Party or Parties not responsible for the act or omission allegedly causing the violation, but only for the legal basis of such an act or omission.<sup>150</sup> In a similar fashion to the procedure set out with regard to cases in which an application is only directed against one High Contracting Party, the Strasbourg Court will then inform both the applicant and the other respondent about the invitation or the request,

147. Gragl, op. cit. *supra* note 27, p. 166.

148. Cf. below for further details on the procedure laid down in Art. 3(4) AA.

149. Lock, op. cit. *supra* note 10, 171.

150. Explanatory Report, cited *supra* note 9, para 56.

and set a short time-limit for comments (analogous to Art. 38 of the Rules of the Court).<sup>151</sup>

At first glance, it is not obvious why Article 3(4) of the Accession Agreement and thus a separate provision on the details of the co-respondent mechanism are necessary when an application is directed against *both* the Union and a Member State at the same time. The main reason for this separate provision is that if a case is directed against multiple respondents (and therefore not *co*-respondents), the ECtHR will examine this case as a bundle of applications each of which is directed against one respondent. As a result, these applications are simply joined together. This also means that each application needs to fulfil the admissibility criteria of Articles 34 and 35 ECHR, most importantly the requirement to exhaust domestic remedies. Compared to the co-respondent mechanism, the applicant does not need to exhaust the domestic remedies within the co-respondent's legal order, as the admissibility criteria of a case will be assessed with regard to the participation of the co-respondent.<sup>152</sup>

### 3.1.5. *The voluntary nature of the co-respondent mechanism*

Article 3(5) AA explicitly states that a High Contracting Party becomes co-respondent entirely voluntarily – either by decision of the ECtHR upon its own request or by accepting an invitation from the ECtHR. The Explanatory Report additionally clarifies that no High Contracting Party to the Convention can be compelled against its will to become a co-respondent. In other words, the acceptance of such an invitation by the concerned High Contracting Party would be a necessary condition for it to become co-respondent. One might argue that the voluntary nature of the co-respondent mechanism reflects the fact that the original application was directed against another party and not against the potential co-respondent and that no High Contracting Party can therefore be forced to become a party to a concrete case where it was not named in the original application.<sup>153</sup> It is nevertheless not entirely clear why a potential co-respondent should not be forced to join the proceedings. It is also beyond doubt that in cases where an application is directed against both the Union and a Member State and both respondents are therefore parties to the case right from the start of the proceedings, they have no choice but to participate in these proceedings in Strasbourg. Most convincingly, such a situation will not differ when these parties are joined as co-respondents by decision of the Strasbourg Court in a later stage of the proceedings.<sup>154</sup> This is

151. Ibid., para 57.

152. Lock, op. cit. *supra* note 10, 167.

153. Explanatory Report, cited *supra* note 9, para 53.

154. Lock, op. cit. *supra* note 50, 1044–1045.

nonetheless a weakness of the Accession Agreement, which could easily have been overcome by introducing an obligation on the EU and the Member States to join proceedings as co-respondent when the compatibility of EU law with a Convention right is called into question.<sup>155</sup>

Yet, even though the Accession Agreement does not contain an explicit obligation for the EU and the Member States to join a case as co-respondents, Annex II of the Accession Agreement at least requires the EU to make a Declaration at the time of signature of the Agreement ensuring that “it will request to become a co-respondent to the proceedings before the European Court of Human Rights or accept an invitation by that Court to that effect, where the conditions set out in Article 3(2) of the Accession Agreement are met.” Despite its non-binding character, it can be expected that the EU will comply with this request not only because of the general principle of *bona fides* in public international law, but also – and especially – because of its specific and unique relationship with the Convention regime and the ECtHR.

### 3.1.6. *The principle of unity of Union and Member States and joint responsibility*

Apportioning responsibility separately to the respondent and the co-respondent would entail a decision on the division of powers between the Member States and the Union and thus certainly encroach upon the EU’s legal autonomy;<sup>156</sup> the EU and its Member States will therefore be considered a legal “unity” for the purpose of the co-respondent mechanism.<sup>157</sup> Article 3(7) AA consequently provides that the respondent and the co-respondent will be jointly responsible for a violation found by the ECtHR, unless the Court decides – on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant – that only one of them be held responsible.

It can nonetheless be assumed that both the EU and the Member States will have a political and monetary interest in exactly indicating the origin of the violation and the precise share of blame in order to guarantee that such violation does not occur again<sup>158</sup> or that the payment of just satisfaction is divided proportionally to each party’s responsibility.<sup>159</sup> This means that after accession, the Union must develop internal rules to determine the procedure

155. O’Meara, “‘A more secure Europe of rights?’ The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR”, 12 *German Law Journal* (2011), 1813–1832, 1821.

156. Explanatory Report, cited *supra* note 9, para 62.

157. Obwexer, *op. cit. supra* note 2, 127.

158. CDDH-UE(2010)17, para 14.

159. Response of the European Group of National Human Rights Institutions, “EU Accession to the ECHR, CDDH-UE”, 15–18 March 2011, 11.

for implementing and activating the co-respondent mechanism and to enforce Strasbourg's judgments in accordance with the division of competences.<sup>160</sup>

Given the confidentiality of the negotiations on the EU-internal rules regarding accession, no details on the concrete arrangement, functioning, and execution of these Union-internal rules are available at this time.<sup>161</sup> One can therefore only speculate how these rules will eventually work or which institutions will be involved. In the past, it has been proposed that either a newly established committee be created, possibly made up of representatives from the Member States and the EU, who would then decide on the basis of Union law how the internal responsibility should be allocated, or that the ECJ be given jurisdiction to assign responsibility.<sup>162</sup> This would of course entail the introduction of a new procedure before the ECJ, since no existing procedure entirely fits the requirements of this special form of action.<sup>163</sup> The introduction of such a procedure before the Luxembourg Court would, nevertheless, also benefit the development and further clarification of European Union law, as it would result in an authoritative and binding interpretation of the Union-internal distribution of competences and responsibilities.<sup>164</sup>

With regard to the substantive determination of responsibility, it is safe to say that it will be a highly complex task to determine whether the EU or a Member State was in fact responsible for an alleged violation of the Convention. Arguably, it may be consistent that the legislative organs of the Union would be held responsible for directly applicable regulations in violation of the Convention as, firstly, the Member States are obliged to comply with their provisions and, secondly, in the majority of cases, they have no discretion in doing so. In most cases, however, EU law is indirectly implemented and enforced by the Member States,<sup>165</sup> which leaves the deciding body with two alternatives. It could either decide that the legal act in violation of the Convention fell within the scope of application by the Member States, since their organs have acted in the first place, or that the Union

160. Jacqué, *op. cit. supra* note 11, 1016.

161. Cf. however Case T-331/11, *Besselink v. Council*, judgment of 12 Sept. 2013, nyr, in which the General Court held that the Council's refusal to give access to Negotiating Directive No. 5 and to those undisclosed parts of the requested document setting out the principles laid down in the EU Treaty that should govern negotiations for EU accession to the Convention, or which only set out the questions to be addressed in the negotiations, was unlawful.

162. Lock, "EU accession to the ECHR: Implications for judicial review in Strasbourg", 35 *EL Rev.* (2010), 777, 787.

163. Cf. e.g., the different preconditions necessary for initiating actions for contractual and non-contractual liability under Arts. 268 and 340 TFEU, respectively.

164. Lock, *op. cit. supra* note 162, 787.

165. Von Danwitz, *Europäisches Verwaltungsrecht* (Springer, 2008), pp. 315–316.

remains responsible as the Member States ultimately act in lieu and support of the European Union.<sup>166</sup>

The internal attribution of responsibility for legal acts in violation of the Convention appears to be even more complex with regard to directives, as they require legislative implementation in the legal system of the Member States. If the directive in question is transposed verbatim or synonymously into domestic law or if the Member State is not left any discretion in doing so, the Union may be held responsible for the violation. This yardstick would of course analogously apply in cases where the transposition into domestic law remains within the boundaries of a certain “structural congruence”<sup>167</sup> or general legal context, which EU law requires the Member State to respect.<sup>168</sup> In other words, if the Member State remains within the limits of the discretion conferred on it, the responsibility lies with the Union; if the Member State chooses to implement provisions going beyond these limits, the respective Member State could be held responsible.<sup>169</sup>

### 3.2. *Inter-party cases after accession*

#### 3.2.1. *Necessary amendments to the Convention*

As there have been no inter-State complaints between EU Member States since the creation of the European Union<sup>170</sup> and the High Contracting Parties very rarely use this particular procedure under Article 33 ECHR in order to enforce human rights, it only plays a minor and rather arcane role in the ECtHR’s human rights protection machinery. Inter-State complaints nevertheless remain an essential part of the Convention which the Accession Agreement must duly take into account with respect to the EU’s specific legal nature in order to allow for the proper functioning of the Convention regime after accession. Article 4 AA therefore introduces the term “inter-Party applications” (in lieu of “inter-State applications”) and therewith clarifies that the European Union, as a non-State entity, will be a full-fledged party to the Convention after its accession. Article 4(1) AA provides for the amendment of Article 29(2) ECHR in order to allow a Chamber of the Court to decide on the

166. Heißl, “Happy End einer unendlichen Geschichte? Der Beitritt der EU zur EMRK und seine Auswirkungen auf Österreich”, in Holoubek, Martin and Schwarzer (Eds.), *Die Zukunft der Verfassung – Die Verfassung der Zukunft? Festschrift für Karl Korinek zum 70. Geburtstag* (Springer, 2010), p. 146.

167. Frenz, *Handbuch Europarecht Band 5: Wirkungen und Rechtsschutz* (Springer, 2010), para 923.

168. Case C-131/88, *Commission v. Germany (Groundwater Directive)* [1991] ECR I-825, para 6.

169. Heißl, op. cit. *supra* note 166, p. 146.

170. Winkler, op. cit. *supra* note 79, p. 84.



admissibility and merits of inter-Party applications submitted under Article 33, whilst Article 4(2) AA changes the heading of Article 33 ECHR itself to read as “Inter-Party cases”.<sup>171</sup> The coexistent standing of the EU and its Member States (both as applicants and respondents before the ECtHR), however, raises considerable questions in the light of Article 344 TFEU and the exclusive jurisdiction of the ECJ.

### 3.2.2. *The ECJ’s exclusive jurisdiction under Article 344 TFEU*

The relevant paragraphs of the Explanatory Report concerning Article 4 AA emphasize that all High Contracting Parties to the Convention will be able to bring inter-Party cases against the EU and *vice versa* under Article 33 ECHR after accession.<sup>172</sup> But the Explanatory Report also correctly notes that it does not govern the issue whether Union law permits inter-Party cases to the Strasbourg Court involving issues of EU law between the EU Member States *inter se*, or between the EU and one of its Member States. It additionally addresses the matter of the EU’s legal autonomy, since Article 344 TFEU and Article 3 of Protocol No. 8 to the Treaties state that the EU Member States “undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.”<sup>173</sup> If the Accession Agreement in fact contained an express provision on this issue, it would undoubtedly encroach on the exclusive jurisdiction of the ECJ and thus on the autonomy of EU law. This, however, is not the case, since the Accession Agreement leaves the solution of this issue to the European Union.

On the other hand, the very silence of the Accession Agreement on this matter raises the question whether Article 344 TFEU will bar the Member States and the EU from bringing inter-Party complaints against one another after accession. When EU accession to the Convention was first mooted in 1979, the potential risks for disrupting the Union’s judicial system in the context of inter-Party applications between Member States and the future relationship between Article 33 ECHR and Article 344 TFEU caused great anxiety.<sup>174</sup> It is the objective and purpose of Article 344 TFEU to guarantee that EU law is interpreted in a consistent and coherent manner which can most efficiently be accomplished by designating the Union courts as the only courts competent to decide problems of EU law.<sup>175</sup> Beyond that, the reference to “the Treaties” in Article 344 TFEU not only refers to primary law, but also to

171. Explanatory Report, cited *supra* note 9, para 71.

172. *Ibid.*, para 70.

173. *Ibid.*, para 72.

174. Commission, cited *supra* note 4, para 27.

175. Lock, “The ECJ and the ECtHR: The future relationship between the two European courts”, 8 *The Law and Practice of International Courts and Tribunals* (2009), 375–398, 389.



secondary law<sup>176</sup> and, most importantly in this context, to international agreements concluded by the EU.<sup>177</sup> In its seminal *MOX Plant* case, the ECJ underlined the importance of Article 344 TFEU and ruled that this provision precludes Member States from initiating proceedings before another court for the settlement of disputes within the scope of Union law.<sup>178</sup> Moreover, the principle of sincere cooperation in Article 4(3) TEU also prohibits the Union organs from submitting a dispute concerning the interpretation or application of EU law to other courts or tribunals.<sup>179</sup> Upon accession, the Convention and the Accession Agreement will also become an integral part of the Union's legal order.<sup>180</sup> This means that under Article 19(1) TEU, the ECJ will have the corresponding jurisdiction to exclusively interpret and apply the provisions of the Convention in disputes between the Member States *inter se* and between a Member State and the EU, if the said dispute also relates to EU law.<sup>181</sup>

Moreover, if a dispute about the Convention also relates to the interpretation and application of EU law, the Member States and the Union organs are correspondingly left with the Union-internal dispute settlement mechanisms provided for by the Treaties, viz. infringement proceedings under Articles 258 TFEU and 259 TFEU; the action for annulment under Article 263 TFEU; and the action for failure to act under Article 265 TFEU. *Prima facie*, these procedures constitute the sole conflict resolution mechanisms available to the Member States and the Union organs for the settlement of disputes between them,<sup>182</sup> while complaints by the Member States *inter se* or between them and the EU under Article 33 ECHR would be incompatible with Article 344 TFEU.<sup>183</sup> It is therefore apparent that this requirement was particularly designed to preserve the role of the ECJ and its exclusive jurisdiction. Yet, it should also be noted that not every dispute between the Member States *inter se* and between the Member States and the EU about the Convention will be linked to EU law – therefore in such cases Article 344 TFEU and the exclusive

176. Wegener, “Art. 344 AEUV” in Calliess and Ruffert (Eds.), *EUV/AEUV-Kommentar* (Beck, 2011), para 1.

177. *Commission v. Germany*, cited *supra* note 64, para 52.

178. Case C-459/03, *Commission v. Ireland (MOX Plant)* [2006] ECR I-4635, paras. 133 and 135.

179. Lock, *Das Verhältnis zwischen dem EuGH und internationalen Gerichten* (Mohr Siebeck, 2010), p. 292.

180. *Haegeman*, cited *supra* note 62, para 5.

181. Cf. also Eeckhout, “Human rights and the autonomy of EU law: Pluralism or integration?”, 66 *Current Legal Problems* (2013), 169–202, 194–195.

182. Schott, “Die Auswirkungen eines Beitritts der EU zur EMRK auf die Durchsetzung des Grundrechtsschutzes in Europa”, *Jusletter* 22 March 2010, 1, p. 4.

183. European Convention, Modalities and consequences of incorporation into the Treaties of the Charter of Fundamental Rights and accession of the Community/Union to the ECHR, CONV 116/02, WG II 1, 18 June 2002, 20, footnote 2.

jurisdiction of the ECJ will correspondingly not apply and the Member States and the EU will be free to submit cases to the ECtHR.

### 3.2.3. *Article 5 AA: The interpretation of Article 55 ECHR*

Luxembourg's exclusive jurisdiction could possibly clash with its counterpart in the Convention, namely Article 55 ECHR, which grants the ECtHR exclusive jurisdiction and priority in settling inter-State complaints between the High Contracting Parties to the Convention under Article 33 ECHR.<sup>184</sup> At first glance, it is obvious that Article 55 ECHR and Article 344 TFEU are diametrically opposed provisions, for both entitle the respective courts to exert exclusive jurisdiction over the same source of law, which is the Convention. This means that after accession, cases between the EU Member States or between a Member State and the Union could be adjudicated by the ECJ *and* the ECtHR.<sup>185</sup> Since both courts consider their jurisdiction as exclusive, it must be decided which of these courts shall have the last say in such cases, lest a conflict of jurisdictions arise<sup>186</sup> due to the normative overlap of the Convention provisions in the Convention itself and in its manifestation as incorporated Union law.

In contrast to Article 344 TFEU, Article 55 ECHR is a flexible exclusive jurisdiction clause, which explicitly acknowledges that the High Contracting Parties to the Convention may choose to waive ECtHR jurisdiction and to settle their disputes before another court or tribunal. Article 5 AA also accommodates the exclusive jurisdiction of the ECJ under Article 344 TFEU and solves the looming jurisdictional conflict between Strasbourg and Luxembourg by indicating that proceedings before the ECJ do not constitute means of dispute settlement within the meaning of Article 55 ECHR. Thus, Article 55 ECHR does not prevent the operation of the rule laid down in Article 344 TFEU,<sup>187</sup> which means that neither the EU nor its Member States violate the Convention if they submit disputes concerning the interpretation or application of the Convention – which will form an integral part of EU law – to the ECJ, and not the ECtHR.<sup>188</sup>

### 3.2.4. *The exhaustion of local remedies rule in support of the ECJ's exclusive jurisdiction*

Due to its potential exclusive jurisdiction in adjudicating inter-Party cases within the scope of EU law, the ECJ might seize the chance to apply Article

184. Obwexer, op. cit. *supra* note 2, 136.

185. Gragl, op. cit. *supra* note 27, 178–179.

186. Lock, op. cit. *supra* note 175, 391–392.

187. Explanatory Report, cited *supra* note 9, para 74.

188. Obwexer, op. cit. *supra* note 2, 137.

344 TFEU extensively and to coerce the Member States to use the Union-internal dispute settlement mechanism in order to solve legal conflicts between them. In cases of non-compliance, the Commission may initiate infringement proceedings under Article 258 TFEU whereupon the ECJ could again resort to the standards found in its *MOX Plant* judgment and hold the Member State in question responsible for undermining the exclusive jurisdiction of the ECJ.<sup>189</sup>

This approach would nonetheless be reconcilable with the objective and purpose of accession and the functioning of the Convention system. One could argue that the involvement of the ECJ in inter-Party cases between the Member States *inter se* and between the EU and the Member States is necessary under Article 35(1) ECHR, because in the case of non-exhaustion of domestic remedies, the case would be declared inadmissible by the ECtHR. As the ECtHR is merely competent to monitor alleged violations of the Convention *subsidiarily*, the domestic courts – including the ECJ after accession – must consequently be afforded ample opportunity to remedy these violations themselves before Strasbourg may decide on them. In other words, the ECtHR has no *complementary* jurisdiction alongside the ECJ to adjudicate upon inter-Party complaints, but rather a *subsidiary* jurisdiction, which can only be triggered after all local remedies have been exhausted, according to Article 35(1) ECHR. Disputes between EU Member States *inter se* or between the Member States and the Union must, as a consequence, firstly be brought before the ECJ for two reasons: firstly, due to the Union-internal provision of Article 344 TFEU, and secondly, due to the international obligations under the Convention itself, namely Article 35(1) ECHR.<sup>190</sup>

This leaves the European Union and the Member States with the procedural avenues provided for by the EU Treaties to settle disputes regarding the interpretation and application of the Convention between them, before they may bring a case to the ECtHR. In such a case, the Member States may use infringement proceedings under Article 259 TEU in disputes *inter se*, and the action for annulment under Article 263(2) TFEU or the action for failure to act under Article 265(1) TFEU against the EU. The European Union, on the other hand, may use infringement proceedings under Article 258 TFEU in order to settle disputes with the Member States before it may submit an inter-party complaint to the Strasbourg Court, but only if the Member State in question has in fact implemented Union law.<sup>191</sup>

189. Gragl, op. cit. *supra* note 27, p. 186.

190. Ibid., p. 188.

191. Cf. also the first sentence of Art.51(1) of the Charter and Schott, op. cit. *supra* note 182, p. 5.

### 3.2.5. *The future of inter-party cases*

This means, in conclusion, that all High Contracting Parties will be able to bring a case against the Union and *vice versa*. But the ECJ nonetheless has the last say in matters regarding Union law and may determine that a Member State has failed to fulfil its obligations under Article 344 TFEU, if said Member State has first lodged an inter-Party application before the Strasbourg Court. In addition, according to Article 35(1) ECHR, the ECJ must be given a chance to remedy alleged violations of the Convention before the ECtHR may adjudicate on any applications. Therefore, the Convention itself enables the ECJ to interpret and apply Union law in order to preserve its well-guarded autonomy. The Member States and the Union are thence obliged to settle their disputes via the Union-internal mechanisms (infringement proceedings, annulment actions, action for failure to act) before they make take their applications to the ECtHR.

### 3.3. *The prior involvement of the ECJ*

#### 3.3.1. *Reasons for introducing the prior involvement procedure*

According to the principles of the Union's legal autonomy, cases relating to EU law may not reach the ECtHR before the ECJ has had the opportunity to adjudicate upon those cases. Therefore, the EU negotiators strove to ensure that external review by the ECtHR be preceded by an effective internal review by the courts of the Member States *and* the EU courts,<sup>192</sup> in order to satisfy the requirements of Article 35(1) ECHR and to avoid any external interference with the EU's autonomous legal order. The principal concern in this regard was that the exhaustion of local remedies under Article 35(1) ECHR would be inadequate or insufficient to guarantee the ECJ's prior involvement in such a situation.<sup>193</sup> This could result in a scenario in which the ECJ might be side-lined in proceedings and where the ECtHR would subsequently interpret a provision of EU law without the prior involvement of the ECJ,<sup>194</sup> thereby undermining the jurisdictional monopoly of Luxembourg and thus the autonomy of EU law.<sup>195</sup> As long as questions of EU law have not yet been

192. Discussion Document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 5 May 2010, paras. 5–7.

193. Kumin, *op. cit. supra* note 63, 82.

194. Cf. Baratta, "Accession of the EU to the ECHR: The rationale for the ECJ's prior involvement mechanism" 50 CML Rev. (2013), 1305–1332, for a more extensive analysis of the prior involvement mechanism.

195. Jacqu , *op. cit. supra* note 11, 1016.

clarified and decided by the ECJ, it is possible that the case in Strasbourg is based on an erroneous understanding of the applicable law.<sup>196</sup>

### 3.3.2. *The solution of the Accession Agreement*

Article 3(6) AA ensures that in proceedings to which the EU is a co-respondent, the Court of Justice of the European Union shall be afforded sufficient time to assess the compatibility with the Convention rights at issue of the provision of Union law as under Article 3(2), if it has not yet made such an assessment. The possibility of involving the ECJ in such proceedings thus creates an institutional link between the courts in Luxembourg and Strasbourg.<sup>197</sup>

As annulment proceedings under Article 263(4) TFEU must in any event be exhausted as domestic remedies under Article 35(1) ECHR,<sup>198</sup> the ECJ will always have had the chance to rule on a case before the ECtHR, if an individual directs an application against the EU itself. Thus Article 3(6) is only applicable in cases which arise from individual applications concerning acts or omissions of the Member States, and in which the applicant first has to exhaust domestic remedies available before the national courts of the respondent Member State in order to ensure that the admissibility criterion of Article 35(1) ECHR is fulfilled. The courts of the Member States may or, in the case of Article 267(3) TFEU, must then refer a question to the ECJ for a preliminary ruling on the interpretation of a primary law provision or the interpretation and validity of a secondary law provision.<sup>199</sup> However, as the parties to the proceedings before the Member State courts can only suggest such a reference, but not enforce it,<sup>200</sup> the preliminary reference procedure cannot be considered as a legal remedy that an individual applicant is required to exhaust before submitting a case to the ECtHR.<sup>201</sup>

As it is uncertain that a reference for a preliminary ruling will be made in every case in which the compatibility of an EU act with the Convention is contested<sup>202</sup> (e.g., if a Member State court erroneously assumes that there is no duty to do so<sup>203</sup>), the ECtHR could need to adjudicate on an application involving EU law, but without the ECJ having the prior chance of reviewing

196. Kokott and Sobotta, "The Charter of Fundamental Rights of the EU after Lisbon", [2010] *EUI Working Papers, Academy of European Law* 2010/6, p. 4.

197. Lock, op. cit. *supra* note 10, p. 181.

198. ECommHR, *Dufay v. The European Communities*, cited *supra* note 52.

199. Explanatory Report, cited *supra* note 9, para 65.

200. Kokott and Sobotta, op. cit. *supra* note 196, p. 5.

201. Explanatory Report, cited *supra* note 9, para 65.

202. Discussion Document of the CJEU, cited *supra* note 192, para 10, and Joint Communication from Presidents Costa and Skouris, 17 Jan. 2011, p. 2.

203. Lock, op. cit. *supra* note 162, 791.

the compatibility of the provision in question by ruling on the validity of a secondary law provision or the interpretation of a primary law provision.<sup>204</sup> It is the objective of the prior involvement procedure in Article 3(6) AA to remedy this potential side-lining of the ECJ. This means, in a nutshell, that contrary to the issue whether the ECtHR may be a superior court or whether it would have the last say in the matter of human rights protection after accession, the legal problem at this point is which court will have the *first say* in such proceedings.<sup>205</sup>

### 3.3.3. *The need for a Union-internal procedure*

Article 3(6) AA remains silent on the prior involvement procedure before the ECJ in order not to interfere with the autonomy of EU law. If the Agreement had provided for a detailed procedure, this would be tantamount to a hidden Treaty amendment and could thus violate the requirements for upholding the autonomy of EU law.<sup>206</sup> Consequently, the final determination of the procedure before the ECJ has been left to the EU; it remains, however, confidential at the time of writing. We may therefore only speculate on the concrete details of this procedure.

The European Commission argued that the general features and the specific procedural rules of the prior involvement of the ECJ should be similar to those governing the preliminary ruling procedure under Article 267 TFEU.<sup>207</sup> The procedure could ideally be initiated by the Commission, requesting the ECJ to decide upon the compatibility of an EU act with the Convention after an application has been declared admissible in Strasbourg.<sup>208</sup> If the Commission makes such a reference, the proceedings before the ECtHR would be suspended, since the assessment by the ECJ is intended to conform to the principle of subsidiarity and should thence take place before the ECtHR decides on the merits of the application.<sup>209</sup> Most importantly, an extension of the Commission's power to initiate proceedings before the ECJ after

204. Explanatory Report, cited *supra* note 9, paras. 65–66.

205. Berger, “Der Beitritt der Europäischen Union zur EMRK” in Österreichische Juristenkommission (Ed.), *Grundrechte im Europa der Zukunft* (Linde, 2010), p. 54.

206. Case 43/75, *Defrenne v. Sabena* [1976] ECR 455, para 58.

207. European Commission, Working Document on the Previous Involvement of the Court of Justice in the Context of the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, DS 1930/10, 10 Jan. 2011, paras. 5–6 and 11.

208. Timmermans, “L’adhésion de l’Union Européenne à la Convention européenne des Droits de l’homme”, Audition organisée par la Commission des affaires constitutionnelles du 18 mars 2010, European Parliament, Committee on Constitutional Affairs, Hearing on the Institutional Aspects of the European Union’s Accession to the European Convention on Human Rights, 18 March 2010, pp. 7–8.

209. Explanatory Report, cited *supra* note 9, para 66.

accession would not violate the autonomy of EU law, as the Commission already has similar procedural avenues at its disposal,<sup>210</sup> e.g. annulment proceedings under Article 263(2) TFEU in order to have legislation reviewed by Luxembourg as to its compatibility with the Charter and the Convention;<sup>211</sup> or infringement proceedings under Article 258 TFEU against the respective Member State, if the national court of last resort has failed to make a reference to the ECJ.<sup>212</sup> If, on the other hand, the Commission prefers not to initiate any proceedings, it may be assumed that the Union does not have any interest in involving the ECJ in the proceedings before the ECtHR. The ECtHR would subsequently be in a position to find such a violation without prior involvement of the ECJ.<sup>213</sup>

### 3.3.4. *Legal consequences of the EU-internal procedure*

Despite the predominant preoccupation of the Accession Agreement with protecting the EU's legal autonomy *vis-à-vis* the Convention system, the last sentence of Article 3(6) AA also addresses the issue that the prior involvement of the ECJ will not affect the powers and jurisdiction of the ECtHR, and that the assessment of the case in question by the ECJ will not bind the Strasbourg Court.<sup>214</sup> It is therefore very interesting to note that this is the only provision in the Accession Agreement which provides that EU accession to the Convention shall affect neither the competences nor the functioning of the Strasbourg Court.

Article 3(6) AA thence only prompts the ECtHR to afford the ECJ sufficient time to assess the case. The wording *sufficient time*, however, is open to various interpretations and raises the question what these words mean exactly and what period of time they should cover. There is no existing comparable form of procedure before the ECtHR, where it would suspend its own proceedings in order to allow another court to examine the case in question. Until there is significant ECtHR case law on this matter after accession, we may preliminarily conclude that the term *sufficient time* is related to the ECJ's obligation to deliver its rulings quickly in order to avoid undue delays, for which the Explanatory Report mentions a time-frame of six to eight months.<sup>215</sup> Should the ECJ exceed this period of time, the ECtHR might convict the EU for a breach of Article 6(1) ECHR and the right to a fair trial within a reasonable time which intends to protect "all parties to court

210. Gragl, op. cit. *supra* note 27, p. 242.

211. Lock, op. cit. *supra* note 162, 793.

212. Kokott, Henze and Sobotta, "Die Pflicht zur Vorlage an den Europäischen Gerichtshof und die Folgen ihrer Verletzung", 61 JZ (2006), 633–641, 640–641.

213. Lock, op. cit. *supra* note 50, 1050.

214. Explanatory Report, cited *supra* note 9, para 68.

215. Ibid., para 69.



proceedings ... against excessive procedural delays”<sup>216</sup> and “underlines the importance of rendering justice without delays which might jeopardize [the Convention’s] effectiveness and credibility.”<sup>217</sup>

Lastly, the Accession Agreement does not explain what legal consequences a decision by the ECJ in prior involvement proceedings will have for the subsequent proceedings in Strasbourg. Particularly in the light of Opinions 1/91 and 1/00, the decision of the ECJ should be binding on the ECtHR,<sup>218</sup> since purely advisory answers given by the ECJ would alter its functional nature.<sup>219</sup> The Explanatory Report nevertheless expressly states that the assessment of the ECJ will not bind the ECtHR,<sup>220</sup> as a binding character of such a decision would amount to an undue privilege of the Union, which no other High Contracting Party enjoys. This means that the Union-internal rules to be adopted within the course of accession must take this change in the jurisdiction of the ECJ into consideration in order to prevent any interference with the autonomy of EU Law. Such a Union-internal rule could, for example, bestow upon such a decision the same legal effects regular preliminary rulings under Article 267 TFEU have (*inter partes* when interpreting EU law, and *erga omnes* when adjudicating upon the validity of EU law).<sup>221</sup> Moreover, if the ECJ found that a certain provision of EU law was compatible with the Convention and no violation of human rights had therefore occurred, this would in no way affect the proceedings in Strasbourg, since the EU-internal proceedings must not substitute the external supervision of the ECtHR.<sup>222</sup> The proceedings would subsequently continue normally in Strasbourg.<sup>223</sup>

It remains, however, unclear what would happen if the ECJ concluded that the EU act in question was incompatible with the Convention and subsequently annulled it *ex tunc*. The Accession Agreement does not address the issue whether applicants would lose their victim status before the ECtHR after such a decision by the ECJ redressed the situation within the EU legal order and remedied the contested breach of the Convention.<sup>224</sup> As Article 34 ECHR requires that the applicant claim to be a victim of a violation of a Convention right, the most substantial consequence of this loss of status would be the case being rendered inadmissible by the ECtHR. One could

216. ECtHR, *Stögmüller v. Austria*, Appl. No. 1602/62, judgment of 10 Nov. 1969.

217. ECtHR, *H v. France*, App. No. 10073/82, judgement of 24 Oct. 1989, para 58.

218. Jacqué, op. cit. *supra* note 11, 1022.

219. Opinion 1/91, *EEA I*, cited *supra* note 45, para 61, and Opinion 1/00, *Proposed Agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area* [2002] ECR I-3493, paras. 25, 33 and 44.

220. Explanatory Report, cited *supra* note 9, para 68.

221. Obwexer, op. cit. *supra* note 2, 135.

222. Lock, op. cit. *supra* note 10, 185–186.

223. Jacqué, op. cit. *supra* note 11, 1022.

224. Obwexer, op. cit. *supra* note 2, 135.



certainly say that the decision of the Member State court in this case, which ultimately upheld the violation of the Convention, would remain unaffected as *res judicata*, and that the applicant would then still be considered a victim for the purposes of the Convention. Only if the national decision were to be revoked, for instance by adequately redressing the violation<sup>225</sup> or by quashing the previous court ruling,<sup>226</sup> would the applicant then lose his or her victim status.<sup>227</sup>

In this context, one should nonetheless bear in mind the principle of *res judicata* as interpreted by the ECJ. In *Kapferer*, the ECJ clarified that a Member State court is not always obliged to disapply its internal rules of procedure in order to set aside a final judicial decision in violation of EU law.<sup>228</sup> However, the national courts cannot circumvent the supremacy of Union law by laying down the principle of *res judicata* of a national provision *vis-à-vis* EU law.<sup>229</sup> The effectiveness of Union law, in particular, would be considerably obstructed if the principle of *res judicata* deprived Member State courts not only of the option of reopening a final judicial decision made in violation of EU law, but also of redressing that violation in subsequent cases involving the same legal issue.<sup>230</sup> Besides the fact that EU law obliges every national court to disapply any provision of national law potentially conflicting with Union law,<sup>231</sup> Luxembourg's rulings in this context show that the principle of *res judicata* will in most of the cases be required to cede to the need to take a binding rule of Union law into account.<sup>232</sup> The decision of the ECJ annulling the EU act in question would, in other words, take precedence over the decision of the Member State court, which would then be obliged to disapply the legal acts and rulings in question.<sup>233</sup> This would accordingly also entail that applicants may principally lose their status as victims, since the ECJ's decision would remedy the violation of the Convention. This loss of the applicant's victim status could only be precluded if the redress offered by

225. Cf. e.g. ECtHR, *Dalban v. Romania*, Appl. no. 28114/95, judgment of 28 Sept. 1999, paras. 41–45; ECtHR, *Burdov v. Russia*, Appl. no. 59498/00, judgment of 4 Sept. 2002, paras. 27–32.

226. Cf. e.g., ECommHR, *Sert v. Turkey*, Appl. no. 17598/90, decision of 1 April 1992.

227. Lock, op. cit. *supra* note 10, 186.

228. Case C-234/04, *Kapferer v. Schlanck and Schick* [2006] ECR I-2585, para 24.

229. Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini* [2007] ECR I-6199, para 63.

230. Case C-2/08, *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v. Fallimento Olimpiclub Srl* [2009] ECR I-7501, paras. 29–32.

231. Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629, para 21.

232. Craig and De Búrca, *EU Law: Text, cases, and materials*, 5th ed. (OUP, 2011), p. 234.

233. Obwexer, op. cit. *supra* note 2, 135.

the ECJ were merely partial;<sup>234</sup> if “the circumstances complained of directly by the applicant still obtain[ed]”,<sup>235</sup> or if the compensation awarded by the Member State court or the ECJ was significantly lower than the compensation usually awarded by the ECtHR<sup>236</sup> and the remedies for affording such compensation were not “speedy, reasoned and executed very quickly.”<sup>237</sup>

#### 4. The EU and the Council of Europe: Institutional interlacing

##### 4.1. Election of judges

###### 4.1.1. The EU judge in Strasbourg

Although it has been discussed in the past whether the EU – as a non-State entity, practically represented by twenty-eight Member State judges at the ECtHR – should even be entitled to have its own permanent<sup>238</sup> or *ad hoc* judge<sup>239</sup> in Strasbourg, the negotiators of the Accession Agreement adhered to the principle of equality of the High Contracting Parties and concluded that it would not be justified to refuse the EU its own judge because of the twenty-eight Member State judges already present in Strasbourg.<sup>240</sup> Beyond that, it was not necessary to include a specific provision on this matter in the Accession Agreement, as Article 20 ECHR already provides that the ECtHR consists of a number of judges equal to that of the High Contracting Parties, and Article 22 ECHR states that these judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party.<sup>241</sup> This means that the EU is entitled to have its own judge at the ECtHR upon its accession to the Convention, who will fully participate in the ECtHR and work

234. ECtHR, *Chevrol v. France*, Appl. no. 49636/99, judgment of 13 May 2003, paras. 42–43.

235. ECtHR, *Ohlen v. Denmark*, Appl. no. 63214/00, judgment of 24 May 2005, para 26.

236. ECtHR, *Scordino v. Italy (No. 1)*, Appl. no. 36813/97, judgment of 29 March 2006, paras. 214–215.

237. ECtHR, *Cocchiarella v. Italy*, Appl. no. 64886/01, judgment of 29 March 2006, para 97.

238. Steering Committee for Human Rights (CDDH), Study of technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights, DG-II(2002)006 of 28 June 2002, paras. 68–69.

239. Krüger and Polakiewicz, “Vorschläge für ein kohärentes System des Menschenrechtsschutzes in Europa”, 28 EuGRZ (2001), 92–105, 102.

240. Steering Committee for Human Rights, DG-II(2002)006, cited *supra* note 238, paras. 67–69.

241. Obwexer, op. cit. *supra* note 2, 138.

on equal footing with his or her colleagues hailing from the other High Contracting Parties.<sup>242</sup>

It would therefore be best to nominate a former ECJ judge who would be exceptionally familiar with the judicial relationship between Strasbourg and Luxembourg.<sup>243</sup> Should the Union decide to nominate a current ECJ judge, he or she must in any event completely resign from their current position, as a judge concurrently working at the ECtHR and the ECJ would blatantly interfere with the autonomy of EU law from the international legal order.<sup>244</sup> Thus the future EU judge will be elected by the Parliamentary Assembly in accordance with Article 22 ECHR from a list of three candidates nominated by the EU, have equal status to the other judges, and participate in cases just as his or her colleagues, and not only in those cases in which the EU is a respondent or co-respondent.<sup>245</sup> The concrete procedure of how to establish the list of suitable candidates for the position of the EU judge in Strasbourg will be conducted on terms to be defined within the EU, and the choice of candidates should take into consideration the directives<sup>246</sup> of the Parliamentary Assembly.<sup>247</sup> The European Parliament has therefore suggested that it should be involved in drawing up the list of candidates in line with a procedure similar to that provided for in Article 255 TFEU for candidates for the position of an ECJ judge.<sup>248</sup>

#### 4.1.2. *Participation in the Parliamentary Assembly*

Article 6(1) AA provides that a delegation of the European Parliament shall be entitled to participate and to vote in the sittings of the Parliamentary Assembly of the Council of Europe whenever the Assembly exercises its functions related to the election of judges in accordance with Article 22 ECHR. It was furthermore regarded as appropriate in this context that the European Parliament – as the only directly-elected body of the European Union representing the citizens of twenty-eight Member States – should be

242. Jacqu , op. cit. *supra* note 11, 1009, and Explanatory Report, cited *supra* note 9, para 76.

243. See Vondung, *Die Architektur des europ ischen Grundrechtsschutzes nach dem Beitritt der EU zur EMRK* (Mohr Siebeck, 2012), p. 266 and Knauff, “Das Verh ltnis zwischen Bundesverfassungsgericht, Europ ischem Gerichtshof und Europ ischem Gerichtshof f r Menschenrechte”, 125 DVBL (2010) 533–542, 538–539.

244. Opinion 1/91, *EEA I*, cited *supra* note 45, paras. 47–53.

245. Jacqu , op. cit. *supra* note 11, 1009, and Eckes, op. cit. *supra* note 22, 269.

246. Council of Europe Parliamentary Assembly, “Nomination of Candidates and Election of Judges to the European Court of Human Rights”, Res. 1646 (2009), 27 Jan. 2009.

247. Jacqu , op. cit. *supra* note 11, 1009.

248. European Parliament, “Resolution on the Institutional Aspects of Accession by the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms” P7\_TA-PROV(2010)0184, 19 May 2010, para 7.

entitled to the same number of representatives in the Parliamentary Assembly as the State(s) entitled to the highest number of representatives under Article 26 of the Statute of the Council of Europe.<sup>249</sup> In practice, this means that the delegation of the European Parliament participating in sittings of the Parliamentary Assembly will be constituted by eighteen representatives.<sup>250</sup>

Article 6(2) AA states that the modalities of the participation of representatives of the European Parliament in the sittings of the Parliamentary Assembly of the Council of Europe and its relevant bodies (e.g. Committees) will be defined by the Parliamentary Assembly in co-operation with the European Parliament. These modalities will be reflected in the internal rules of the Parliamentary Assembly,<sup>251</sup> which means that the Assembly's Rules of Procedure<sup>252</sup> require certain amendments to revise the existing provisions in order to accommodate the specific legal nature of the European Union.<sup>253</sup> To that effect, the Parliamentary Assembly and the European Union conducted discussions on these issues during the drafting of the Accession Agreement and established a *Joint Informal Body* to co-ordinate the communication of information on the EU's accession to the Convention<sup>254</sup> and to arrange the mode in which representatives of the European Parliament will participate and vote within the Parliamentary Assembly's different bodies in the election process.<sup>255</sup> Similarly, the European Union is expected to draft its internal rules in order to define the modalities for the selection of the list of candidates in respect of the Union to be submitted to the Parliamentary Assembly.<sup>256</sup>

#### 4.2. *EU Participation in the Committee of Ministers*

##### 4.2.1. *Functions of the Committee relating to the Convention*

Until the European Union's accession to the Convention, members of the Council of Europe and the High Contracting Parties to the Convention have

249. Explanatory Report, cited *supra* note 9, para 75.

250. Cf. also Art. 26 of the Statute of the CoE, listing 18 representatives as the highest number of representatives awarded to France, Germany, Italy, Russia, and the UK.

251. Explanatory Report, cited *supra* note 9, para 76.

252. CoE Parliamentary Assembly, Rules of Procedure of the Assembly, Res. 1202 (1999), 4 Nov. 1999.

253. E.g. provisions such as Rule 17 providing that the representatives appointed by the national parliaments of each High Contracting Party shall form national delegations will certainly require revision, since the representatives of the European Parliament cannot be considered representatives appointed by a national parliament.

254. CoE Parliamentary Assembly, Follow-Up to the Reform of the Council of Europe, Resolution 1783 (2011), 25 Jan. 2011, para 17.4.

255. CoE Parliamentary Assembly – European Parliament Joint Informal Body, Synopsis of the Meeting Held in Paris on 15 June 2011, AS/Bur/AH EP PACE (2011)04, 17 June 2011.

256. Explanatory Report, cited *supra* note 9, para 76.

been identical. As a result, there was no need to distinguish between the functions of the Committee of Ministers under the Convention and its functions as an organ of the Council of Europe.<sup>257</sup> However, as the EU does not become a member of the Council of Europe, it will not be automatically represented with a voting representative in the Committee of Ministers (Art. 14 of the Statute of the CoE). Since this would prevent the EU from exercising several tasks in the Committee of Ministers under the ECHR, certain rules for the EU's involvement in this body were drawn up to allow the Union proper participation in the Committee without becoming a member of the Council of Europe.<sup>258</sup>

Among the most important tasks of the Committee of Ministers under the Convention are the supervision of the execution of ECtHR judgments (Art. 46 ECHR) and of the terms of friendly settlements (Art. 39 ECHR) as well as requesting advisory opinions from the ECtHR on certain legal questions concerning the interpretation of the Convention and the Protocols (Art. 47 ECHR) and reducing the number of judges of the Chambers (Art. 26(2) ECHR).<sup>259</sup> Beyond that, the Committee of Ministers is also responsible for several tasks which are not explicitly foreseen in the Convention, but nonetheless contribute to its overall functioning, such as the adoption of additional Protocols to the Convention and of other legal instruments addressed to the ECtHR or to the High Contracting Parties (Art. 54(1), revised by Art. 7(1) AA).<sup>260</sup> Article 7(3) AA guarantees that the EU will be consulted within the Committee before the adoption of a legal instrument related to the Convention or to the selection of candidates for election of judges by the Parliamentary Assembly.

#### 4.2.2. *Supervision of obligations in cases where the EU is respondent or co-respondent*

Article 7(2) AA provides that when the Committee of Ministers takes decisions under these aforementioned provisions, the EU will be entitled to participate in these meetings with the right to vote. This means that the EU and its Member States will command twenty-nine of forty-eight votes. In this regard, however, the principle of equality between the EU and the other High Contracting Parties will not apply when the Committee of Ministers supervises the execution of judgments and the terms of friendly settlements against either the EU alone or against the EU and one or more of its Member States as respondents and co-respondents (Art. 7(4)(a) AA). Since the

257. Jacqué, *op. cit. supra* note 11, 1009.

258. Lock, *op. cit. supra* note 10, 186.

259. Explanatory Report, cited *supra* note 9, para 78.

260. *Ibid.*, para 80.

principle of sincere cooperation under Article 4(3) TEU obliges the EU and the Member States to act in a coordinated manner when expressing positions and voting,<sup>261</sup> this may force the Member States to vote in concert with the EU and to block the supervision of the execution of judgments against the EU, since it would be unlikely that the Union would agree with a decision that it has failed to implement an ECtHR judgment.<sup>262</sup> In this event, the Explanatory Report sets out newly and specifically designed voting rules in order to prevent “EU block-voting” and thus undermining the execution of judgments against the Union. Certain “hyper-minorities” will ensure that the non-EU Member States in the Committee of Ministers will be able to supervise the proper execution of ECtHR judgments and the terms of friendly settlements even *vis-à-vis* a majority of the EU itself and its Member States.<sup>263</sup>

#### 4.2.3. *Supervision of obligations in cases against High Contracting Parties other than the EU*

In the first scenario of this special example of supervision, the Union will be precluded under the EU Treaties from expressing a position or exercising its right to vote, when obligations under the Convention by one or more of the EU Member States are being supervised, and the Union has not participated in the proceedings as either respondent or co-respondent.<sup>264</sup> This is due to the fact that any participation in the supervision of judgments against Member States outside the ambit of EU law would constitute a new competence for the Union and thus violate the requirements of Article 6(2) TEU and Article 2 of Protocol No. 8<sup>265</sup> – otherwise the EU would have participated in the proceedings as either respondent or co-respondent in the first place. In this event, the EU Member States will be under no obligation under the Treaties to act in a coordinated manner and they can accordingly express their own position and vote (Art. 7(4)(b) AA).<sup>266</sup>

The second scenario of supervision in this context is slightly different from the first one. When the Committee of Ministers supervises the fulfilment of obligations under the Convention by a non-EU Member State, the EU Member States have, again according to Article 7(4)(b) AA, no obligation under the Union Treaties to express a position or vote in a coordinated manner. The Member States can thus express their own position and vote, which may also differ from that expressed by the EU itself.<sup>267</sup> This also means that in this

261. Ibid., para 82.

262. Lock, op. cit. *supra* note 10, p. 187.

263. Explanatory Report, cited *supra* note 9, paras. 84–90.

264. Ibid., para 91.

265. Obwexer, op. cit. *supra* note 2, 140.

266. Explanatory Report, cited *supra* note 9, para 91.

267. Ibid., para 92.

scenario, the EU is not precluded from exercising its right to vote. The competence for doing so stems from Article 21 TEU and the objective to contribute to the protection of human rights on the international scene.<sup>268</sup> From an international legal viewpoint of the other nineteen High Contracting Parties to the Convention (which are not EU Member States), this special arrangement amounts to an unequal treatment, since the EU participates in the supervision of ECtHR judgments and of terms of friendly settlements against non-EU Member States, but not against its own Member States.<sup>269</sup> Given the legal and political difficulties in amending primary law, this inequality cannot be easily removed by simply allowing the Union to participate in the supervision of judgments against its own Member States (e.g. by introducing a respective provision into the Treaties). In fact, this inequality may only be overcome by also precluding the Union from participating in the supervision of judgments against non-EU Member States or by procedurally constraining this participation.<sup>270</sup>

## 5. Conclusion

This contribution demonstrates that both the entire process of EU accession to the Convention and the Accession Agreement do, in fact, constitute a giant leap for European human rights. Accession will be a historic achievement<sup>271</sup> and thus pivotal in overcoming existing inconsistencies in the case law of the ECJ and the ECtHR and in closing considerable gaps in the European system of fundamental rights protection. International law has never before seen the accession of an international or supranational organization as legally integrated as the EU to a human rights treaty regime with a judicial monitoring mechanism as sophisticated as that of the Strasbourg Court. After negotiations between the Council of Europe and the EU were successfully concluded in April 2013, the EU accession to the Convention is now legally tangible and imminent. Absent any political obstacles, the Union will eventually become both the forty-eighth High Contracting Party and the first non-State signatory to the Convention.<sup>272</sup> After more than thirty years of discussion, the adverse effects of two parallel and juxtaposed legal regimes will be overcome by the integration of the EU into Strasbourg's human rights protection system, which

268. Obwexer, op. cit. *supra* note 2, 140.

269. Uerpmann-Wittzack, "Rechtsfragen und Rechtsfolgen des Beitritts der EU zur EMRK" in Obwexer (Ed.), *Die Europäische Union im Völkerrecht*, Europarecht Beiheft 2 (Nomos, 2012), II.4.

270. Obwexer, op. cit. *supra* note 2, 140.

271. Ladenburger, op. cit. *supra* note 3, 44.

272. O'Meara, op. cit. *supra* note 155, 1813.



means that divergences in human rights standards are expected to cease to occur, and a greater degree of coherence in the field of human rights protection will be assured. Subjecting EU law and the actions and omissions of the EU institutions to the external control of the ECtHR closes an enormous lacuna in the protection of human rights in Europe, as the Member States can no longer hide behind the institutional veil of the EU and the EU itself can no longer escape any obligations due to the ECtHR's lack of jurisdiction *ratione personae* in a post-accession world.

Besides triumphing in the obvious advantages of accession, we must, however, at the same time acknowledge that there are major legal problems in the context of accession, most notably the possible dangers to the autonomy of EU law.<sup>273</sup> The Accession Agreement represents – despite its overall clarity and concise brevity – a *tour de force*, which had to walk a fine line, balancing the EU's legal autonomy with the overall functioning of the Convention regime. The introduction of the co-respondent mechanism is to be welcomed as an effective method of both maintaining the EU's legal autonomy and enabling individual applicants to overcome certain procedural gaps in the European multi-level maze of human rights protection. Notwithstanding this groundbreaking and innovative mechanism, there is a serious risk that the co-respondent mechanism may become so complicated that well-meant solutions might create even more issues in this regard.<sup>274</sup> This fact demands the adoption of detailed internal rules specifically designed to address and solve these issues. At the end of the day, the decision of the Council of the EU to conclude the Accession Agreement under Article 218(6) TFEU is primarily dependent on the prior adoption of these new internal rules,<sup>275</sup> which may add further chapters to the “accession saga”.<sup>276</sup>

With respect to the prior involvement of the ECJ under Article 3(6) AA, it is of utmost importance for the future functioning of the judicial interplay between Luxembourg and Strasbourg that the Statute of the Court of Justice and its Rules of Procedure are accordingly and appropriately amended to ensure that the ECJ's Union-internal review is conducted efficiently and without undue delays for individual applicants.<sup>277</sup> The ECJ's special position within the Convention system after accession stems from the Union's particular legal order and its success as an integration organization. At the same time, however, one could argue that the prior involvement of the ECJ amounts to an undue privilege amongst the High Contracting Parties and that

273. Besselink, op. cit. *supra* note 15, p. 40.

274. Lock, op. cit. *supra* note 50, 1054.

275. Jacqu , op. cit. *supra* note 11, 1022–1023.

276. Lock, op. cit. *supra* note 10, 196.

277. O'Meara, op. cit. *supra* note 155, 1826.

this step raises doubts about the EU's degree of integration to join the Convention on an equal footing with the other High Contracting Parties.<sup>278</sup>

At the end of the day, it is nevertheless clear that despite all these practical issues, EU accession to the Convention is the missing apex within the European edifice of human rights protection. Thirty years of political and academic discussions and three years of diplomatic efforts have finally resulted in an instrument which is capable of resolving the legal problems regarding the EU's specific and autonomous legal system. Certainly, the negotiators could only consider those issues that had already arisen at the time of drafting. Thus, the Luxembourg and Strasbourg Courts are called upon to balance any shortcomings of the Accession Agreement by properly interpreting and applying the relevant provisions of European human rights law. Eventually, these courts must bear in mind that the purpose and objective of accession is not to distinguish themselves in judicial battles with their respective counterpart, but to cooperate in order to improve the protection of human rights for individuals in Europe.

278. Eckes, *op. cit. supra* note 22, 284.

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